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Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD,

Petitioner,

v.

BARACK H. OBAMA, DAVID M. THOMAS, JR., TOM COPEMAN, and ROBERT M. GATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Diana M. Rutowski
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
650-614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
212-506-5000
jewald@orrick.com

Counsel for Petitioner

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QUESTION PRESENTED

The risk of misclassifying an individual as an enemy combatant varies by the circumstances of capture. The risk of error is minimized when individuals are captured in the midst of battle, such as the detainee in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The risk is increased when the individual is not engaged in armed conflict when captured, such as the Petitioner, an amputee who was surrendered at a civilian hospital in Afghanistan. In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that aliens detained at Guantanamo Bay are entitled to a "meaningful opportunity" to challenge the factual basis of their detention. The Court of Appeals has held that in all Guantanamo habeas cases—regardless of the risk of erroneous detention—all evidence, including hearsay, is admitted without precondition, witnesses are not required (and thus cannot be confronted), and preponderance of the evidence is the applicable standard of proof.

Do the procedural rules adopted by the Court of Appeals for all Guantanamo habeas proceedings provide individuals who were not engaged in armed conflict when captured with a "meaningful opportunity" to challenge their indefinite detention?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unclassified version of the decision of the United States Court of Appeals for the District of Columbia Circuit is published at 608 F.3d 1, and is reproduced in the Appendix ("App.") at App. 1. The unclassified version of the decision of the United States District Court for the District of Columbia (Robertson, J.) is published at 646 F. Supp. 2d 20, and is reproduced at App. 24. The classified versions of both decisions are maintained under the control of the Court Security Office and can be provided to the Court if required.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 2010. Awad filed a timely petition for panel rehearing on July 19, 2010, which the Court of Appeals denied on September 1, 2010. App. 39. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

More than two years ago, this Court held in *Boumediene v. Bush*, 553 U.S. 723 (2008), that aliens detained at Guantanamo Bay have a constitutional right of habeas corpus. The Court recognized that the right would prove empty if detainees did not have a "meaningful opportunity" to demonstrate their detention is erroneous. The Court left initial development of those meaningful standards to the inferior courts.

In a series of cases, the United States Court of Appeals for the District of Columbia has considered the question and defined a uniform standard for the District Court to use in all Guantanamo habeas cases. Under the Court of Appeals' approach, all hearsay is admitted without precondition or explanation: There is no foundation that needs to be established; there is no authentication requirement; and there is no requirement to demonstrate the reliability of evidence before it is admitted. Witnesses are not required under any circumstance and are rarely, if ever, offered by the government. Eliminating all such traditional requirements for the admission of evidence would be of less moment if the Court of Appeals insisted upon a standard of proof sufficient to protect non-combatant detainees from the real risk of erroneous detention on the basis of unreliable evidence, but instead, the Court of Appeals chose to pair its evidentiary free pass with the preponderance of the evidence standard.

The Court of Appeals' chosen approach presents a serious and clear issue for this Court to consider. I· the Court of Appeals' view, one standard of review applies to all detained at Guantanamo even though the risk of erroneous detention is not the same for all. Some—like the petitioner in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)—were captured on the battlefield engaged in combat. Others—like Petitioner Awad—were not. Awad was a patient in a civilian hospital in Afghanistan. While at the hospital, a large portion of his severely injured leg was amputated. During Awad's recovery from that serious operation, a group of al Qaeda fighters overtook the hospital. Awad was surrendered to coalition forces during the siege, not taken while

engaging in hostilities. On the basis of a case the government constructed entirely from multi-layer hearsay—a case the District Court charitably termed "gossamer thin"—the Court of Appeals affirmed Awad's indefinite and potentially lifetime detention under a preponderance of the evidence standard.

Boumediene recognized the tension between the detainee's liberty interest and the government's interest in detaining those individuals who threaten the security of the United States. *Boumediene* directed courts to balance those competing interests in determining how to conduct habeas review, including the procedural and substantive standards appropriate to different types of cases. Here, the Court of Appeals' one-size-fits-all procedural regime fails to consider at least two factors significant to determining the level of scrutiny appropriate to avoiding an erroneous detention: (i) the absence of a prior trial-type determination of detainable status; and (ii) the circumstances of capture. This violates the Court's directive in *Boumediene* and is an avulsive shift in the course of habeas jurisprudence.

Habeas corpus is an adaptable remedy, *Boumediene*, 553 U.S. at 779, but the Court of Appeals has turned the Great Writ into a rubber stamp. Under the Court of Appeals' rule, lifetime detention of an individual who was not engaged in hostilities when captured can be based on rank hearsay considered against the lowest burden of proof. That is not the "meaningful review" *Boumediene* envisioned.

This Petition presents the issue unambiguously and there is no need to await more lower-court illumination. First, no circuit conflict can develop

because the D.C. Circuit is the exclusive forum for Guantanamo habeas proceedings. Second, more adjudications will not generate different perspectives because the Court of Appeals has stated clearly that the evidentiary rule and standard of proof will be the same in all cases. The Court of Appeals has reaffirmed its rule in multiple decisions and has rejected *en banc* review. If this Court does not address this issue, the Court of Appeals will be the last word on what constitutes a "meaningful opportunity" for individuals held at Guantanamo to challenge their detention. That should not be the ultimate resolution of this question of paramount national importance.

STATEMENT

Awad has been imprisoned at the United States Guantanamo Naval Base since early 2002, nearly a quarter of his life. Awad filed a petition for a writ of habeas corpus in 2005 under 28 U.S.C. § 2241(a), challenging the lawfulness of his detention at Guantanamo. His petition waited in limbo for a number of years as various jurisdictional questions were litigated through the federal court system.

A. Precedential Backdrop

In 2004, this Court reversed the Court of Appeals and held in *Rasul v. Bush*, 542 U.S. 466, 485 (2004), that the statutory habeas jurisdiction of federal courts extended to detainees at Guantanamo Bay. That same year a plurality of this Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-537 (2004) that due process required a United States citizen being held as an enemy combatant to have a

meaningful opportunity to contest the factual basis for his detention.

The next year Congress enacted the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2739, which purported to strip the federal courts of habeas corpus jurisdiction in cases filed by Guantanamo detainees. The DTA also provided that the D.C. Circuit shall have "exclusive" jurisdiction to review decisions of the Combatant Status Review Tribunals ("CSRT"), which the Deputy Secretary of Defense established to determine whether individuals detained at Guantanamo were "enemy combatants."

This Court then held in *Hamdan v. Rumsfeld*, 548 U.S. 557, 583-84 (2006), that the DTA did not apply to cases pending at the time of the DTA's enactment. Congress responded by enacting the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), which purported to strip the federal courts of habeas corpus jurisdiction in all cases, pending or otherwise, filed by Guantanamo detainees. The Court of Appeals held that the MCA did not violate the Suspension Clause of the Constitution and ordered that the habeas cases be dismissed for lack of jurisdiction. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007).

This Court again reversed the Court of Appeals. It held that the Suspension Clause has full effect at Guantanamo and that the jurisdiction-stripping provision of the MCA unconstitutionally suspended the writ. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008). Specifically, the Court held that the CSRT and DTA processes were inadequate substitutes for the writ. *Id.* The Court found that the detainees

were entitled to a prompt habeas hearing that constituted a "meaningful opportunity" to challenge the bases of their detentions. *Id.* at 779, 783. Boumediene left to the inferior courts the development of "meaningful" standards.

B. The District Court Proceedings

After this Court's decision in *Boumediene*, Awad's case proceeded. The government filed a factual return that asserted the grounds for Awad's detention. The government claimed that Awad was an al Qaeda fighter properly detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF").

Awad made several requests for discovery, all of which were met with blanket objections that the District Court sustained. Awad then submitted his traverse in which he denied being part of al Qaeda. Both parties moved for judgment on the record.

1. *The Undisputed Facts*

The parties do not dispute that Awad grew up in Yemen and traveled to Afghanistan in September 2001 at age 19. JA-96, ¶¶ 1, 3, 5; JA-121, ¶¶ 1, 3, 5.[1] The parties also do not dispute that Awad was seriously injured near Kandahar airport by an air raid that severely injured his right leg. JA-98, ¶ 13; JA-122, ¶ 13. As a result of the injury, a large portion of that limb was amputated. JA-107, ¶ 26; JA-115, ¶ 26. The parties also agree that after the air raid, Awad arrived at Mirwais hospital, where

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[1] Citations to JA- __ are to the Joint Appendix filed below.

his leg injury was treated. JA-98, ¶ 15; JA-122-23, ¶ 15. The parties, however, dispute the date and circumstances of Awad's arrival at the civilian hospital. *Id.*

The parties further agree that al Qaeda fighters overtook the hospital at some time during the first week of December 2001 and that local Afghan forces laid siege to the hospital. JA-98, ¶ 14; JA-122, ¶ 14. One of the al Qaeda fighters in the hospital was former Guantanamo detainee Majeed al Joudi, who later purported to identify Awad as one of the al Qaeda fighters. App. 6-7. Al Joudi was captured by Afghan forces when he was tricked into leaving the barricade area. App. 4. Al Joudi denied being an al Qaeda fighter himself, but the government concluded that he lied in that regard. App. 14.

There is no dispute that Awad was surrendered by the insurgents to Afghan forces at Mirwais hospital in December 2001, after his lower leg was amputated. JA-98, ¶ 17; JA-123, ¶ 17. It is undisputed that Awad was not carrying any weapons or documents when he was surrendered. JA-98, ¶ 19; JA-123, ¶ 19. In January 2002, the siege ended when the Afghan forces killed the al Qaeda fighters inside the hospital. JA-98, ¶ 16; JA-123, ¶ 16.

2. *Government's Facts—Disputed*

The government constructed its narrative on a 100% hearsay record. It contended that Awad traveled to Afghanistan in September 2001 to join the fight, where he allegedly trained at the al Qaeda Tarnak Farms camp. App. 25-26. After attending Tarnak Farms, the government alleged that Awad

was injured in December 2001 in an airstrike near Kandahar Airport along with other al Qaeda fighters he met at Tarnak Farms. JA-107 ¶ 29, App. 26. That injured group of al Qaeda fighters, allegedly including Awad, went to Mirwais Hospital in Afghanistan for treatment. App. 26. The group of fighters then barricaded themselves inside the hospital while United States and associated forces laid siege to the hospital. *Id.* The government further alleged that Awad's fellow al Qaeda fighters gave him up to Afghan forces. *Id.*

3. *Awad's Response To The Government*

Awad disputed the government's allegations of his association with al Qaeda and of his enemy combatant status. Awad traveled to Afghanistan to visit another Muslim country, intending to return home after a few months. App. 27. He was injured in early November 2001 by an air raid in Kandahar. *Id.* He was taken to Mirwais hospital for treatment, where a substantial part of his leg was amputated. JA-98 ¶ 13. While in the hospital he was virtually immobile and heavily sedated, falling in and out of consciousness. App. 27. Awad told the District Court in his affidavit that "[a]t no point did [he] associate with, coordinate with or take up arms with alleged al Qaeda members in the hospital." JA-303, ¶ 12.

4. *The Hearing*

The District Court held a merits hearing on July 31, 2009. The proceeding would be more accurately characterized as an oral argument. No evidence was formally admitted during the hearing because the

parties had previously submitted all of the evidence to the Court. No witness testified at the hearing, which consisted solely of argument by counsel for the government and Awad.

C. The District Court's Opinion

On August 12, 2009, the District Court issued a Memorandum Order Denying Writ of Habeas Corpus. The District Court admitted all of the government's hearsay exhibits—the government offered nothing else. App. 29. The court indicated that it would assess each piece of evidence "for consistency, the conditions in which the statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay." *Id.* The District Court also determined that the AUMF gives the President authority to detain persons "who were part of" al Qaeda. App. 28.[2]

The District Court found that Awad came to Afghanistan to join the fight. App. 36. The District Court, however, rejected much of the government's remaining narrative, including the allegation that Awad trained to become an al Qaeda fighter at Tarnak Farms. *Id.* All the government offered to support the allegation was a list of names found at Tarnak Farms, which contained two references (one

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[2] The District Court rejected Awad's argument that it was improper to detain him unless the government demonstrated that he poses a continuing threat. App. 30. The District Court concluded that "Awad is a marginally literate" individual "who has spent more than seven of his twenty six years—since he was a teenager—in American custody. It seems ludicrous to believe that he poses a security threat now, but that is not for me to decide." *Id.*

crossed out) to "Abu Waqas," a nickname attributed to Awad. App. 6. The District Court found that "[w]e do not know the purpose of the list or when it was written" and further found there was "no reliable evidence that [Awad] actually trained" at Tarnak Farms. App. 32, 36.

The District Court found that Awad was injured during an air attack in November 2001 and arrived at Mirwais hospital shortly thereafter, where his leg was amputated. App. 10, 35, 36 n.8. The District Court therefore rejected the government's allegation that Awad was injured in December 2001 with the other al Qaeda fighters and arrived at the hospital with them. App. 35-36.

The District Court further found that Awad at some point in time joined the fighters behind the barricade inside the hospital. App. 38. For what allegedly occurred inside the hospital, the District Court relied largely on the double hearsay statements found in an interrogation report that were attributed to al Joudi, who purported to identify Awad as one of the al Qaeda fighters. App. 6-7, 33-34.

The District Court found that in December 2001 Awad was surrendered to Afghan forces in the hospital. App. 33. The District Court rejected the only purported first-hand evidence of Awad's capture relied on by the government—an interview report with the individual who claimed to have led the group that had taken Awad into custody—as "internally inconsistent [and] completely unreliable." App. 35.

The District Court did not identify any direct evidence that Awad performed a single hostile act

against United States or coalition forces. Rather, the determining factor appears to have been the purported correlation of similar names on four documents, including the Tarnak Farms list and the al Joudi interrogation report, a correlation the District Court found to be "too great to be a mere coincidence." App. 37. The District Court stated in its conclusion that the "[t]he case against Awad is gossamer thin. The evidence is of a kind fit only for these proceedings and has very little weight." App. 38. Nevertheless, the court concluded that "it appears more likely than not that Awad was, for some period of time, 'part of' al Qaida." *Id.* Awad appealed the denial of the habeas petition to the Court of Appeals.

D. The Court Of Appeals' Decision

While Awad's appeal was pending the Court of Appeals decided *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), which was the first appellate decision from a merits determination of a Guantanamo habeas petition. The Court of Appeals' opinion in this case was the second.

Awad appealed on the grounds, among others, that the District Court erred in resting its decision on unreliable hearsay and by applying a preponderance of evidence standard of proof.

The Court of Appeals rejected the argument that the District Court used unreliable hearsay, finding that Awad had the burden to establish the evidence's unreliability and that he had failed to do so. App. 12-13. The court also reaffirmed the statement in *Al-Bihani* that all hearsay evidence in Guantanamo

habeas cases is admissible; the only issue is reliability. App. 12 (citing *Al-Bihani*, 590 F.3d at 879). After summarizing the evidence offered by the government, the Court of Appeals found that the district court did not commit clear error in holding that Awad was part of al Qaeda. App. 16.

The Court of Appeals also rejected Awad's challenge to the standard of proof. Relying on *Al Bihani* and this Court's plurality decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality op.), the Court of Appeals held that "the preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF." App. 20-21.

E. The Current State Of Guantanamo Habeas Litigation

The Court of Appeals has issued five Guantanamo decisions since the opinion below. Not one detainee has prevailed before the Court of Appeals and had his habeas petition granted. In three of the cases, the Court of Appeals found in favor of the government. *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010) (affirming denial of Guantanamo habeas petition); *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (reversing grant of Guantanamo habeas petition), *petition for cert. filed*, No. 10-487 (U.S. Oct. 8, 2010); *Al-Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010) (affirming denial of Guantanamo habeas petition), *petition for cert. filed*, 10-439 (U.S. Sept. 28, 2010). In the fourth case, the Court of Appeals vacated the District Court's grant of the habeas petition and remanded the case for further proceedings consistent with the opinion. *Salahi v. Obama*, No. 10-5087, 2010 WL 4366447, at

*8 (D.C. Cir. Nov. 5, 2010). And in the fifth case, the Court of Appeals remanded the case for further consideration of the government's evidence on whether the detainee was part of al Qaeda. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010) (remanding case "for the district court to determine whether, considering all reliable evidence, Bensayah was functionally part of al Qaeda."). There are approximately 20 cases involving Guantanamo habeas petitions currently pending before the Court of Appeals and many more are pending before the District Court.

REASON FOR GRANTING THE PETITION

THE INDISCRIMINATE ADMISSION OF EVIDENCE AND THE USE OF A PREPONDERANCE OF THE EVIDENCE STANDARD, TAKEN TOGETHER, DO NOT SUFFICE TO PROTECT AGAINST THE REAL RISK OF ERROR INHERENT IN THE INDEFINITE DETENTION OF INDIVIDUALS WHO WERE NOT ENGAGED IN ARMED CONFLICT WHEN CAPTURED

A. The Boundaries Set By *Boumediene* and *Hamdi*

In 2008, this Court held in *Boumediene* that aliens detained at Guantanamo Bay have the constitutional right of habeas corpus. In doing so, the Court left open the question of "[t]he extent of the showing required of the Government in these cases." 553 U.S. at 787.

Boumediene did not explicitly decide the procedural and substantive standards that would govern the habeas proceedings, but it did establish certain guidelines. The "privilege of habeas corpus entitles the prisoner to a meaningful opportunity" to challenge the basis for their detention. *Id.* at 779. The "writ must be effective" and the "habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783. To determine the necessary scope of review, the Court must look to "the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Id.*

In any habeas proceeding, the scope of review "in part depends upon the rigor of any earlier proceedings." *Boumediene*, 553 U.S. at 781. With Guantanamo detainees, there has been no previous judgment by a court of record; the detention is by executive order. *Id.* "Where a person is detained by executive order . . . the need for collateral review is most pressing." *Id.* at 783. Here, the Court of Appeals appears not to have given any significance to the absence of a prior adversarial proceeding conducted with due process protections.

The Court stressed in *Boumediene* that "above all," habeas corpus is an "adaptable remedy. Its precise application and scope change[s] depending upon the circumstances." *Boumediene*, 553 U.S. at 779. To determine "the process due in any given instance," the Court has turned to the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Hamdi*, 542 U.S. at 529; *Boumediene*, 553 U.S. at 781. *Mathews* requires that courts balance the private and governmental

interests by analyzing "the risk of an erroneous deprivation of [a liberty interest;] and the probable value, if any, of additional or substitute procedural safeguards." *Boumediene*, 553 U.S. at 781 (quoting *Mathews*, 424 U.S. at 335).

"It is beyond question that substantial interests lie on both sides of the scale" in the Guantanamo detention cases. *Hamdi*, 542 U.S. at 529. The detainee's interest "is the most elemental of liberty interests—the interest in being free from physical detention" by the government. *Id.* While these are civil cases, the detainees are on trial for their liberty. The consequence of an erroneous detention is the "significant" risk of "detention of persons for the duration of hostilities that may last a generation or more." *Boumediene*, 553 U.S. at 785. Awad, for example, has already been detained for nearly nine years. The interest on the government side is also substantial—"ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[3] *Hamdi*, 542 U.S. at 531.

Taken together, *Boumediene* and *Hamdi* teach that a uniform procedural regime for all Guantanamo habeas cases is unacceptable. "[T]he risk of an erroneous deprivation of [a liberty interest]," *Boumediene*, 553 U.S. at 781, varies

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[3] However, as the years of indefinite detention drag on to nearly a decade, the national security considerations grow weaker. *See Rasul*, 542 U.S. at 488 (Kennedy, J., concurring) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker").

depending on the circumstances of the case, particularly the facts relating to the capture. With classic battlefield combat involving the uniformed armies of nation states, the risk of erroneously detaining an individual is small. That was the situation presented in *Hamdi*, which involved an alleged enemy combatant who was captured while carrying an assault rifle, as part of a Taliban unit, in a "foreign combat zone." *Hamdi*, 542 U.S. at 512-13, 523.[4] The risk of erroneous deprivation of liberty is much higher, however, in cases like Awad's. There is no evidence that Awad was engaged in combat against the United States or coalition forces at any time.

The question for this Court is whether providing individuals held at Guantanamo with a "meaningful opportunity" to challenge their detention means that procedural rules in Guantanamo habeas cases must adapt to diverse circumstances of capture. The Court of Appeals' rules decidedly do not.

B. The Minimal Procedural Protections Adopted By The Court Of Appeals For All Detainees Do Not Allow Meaningful Review In A Case Like Awad's

The Court of Appeals' rulings that one standard applies to all Guantanamo habeas proceedings defies

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[4] Of course, individuals detained on or near the battlefield may have a meritorious petition for a writ of habeas corpus. A plurality of the Court recognized that in the circumstances of *Hamdi*, the habeas procedures must ensure that an "errant tourist, embedded journalist, or local aid worker has a chance to prove military error." *Hamdi*, 542 U.S. at 534.

this Court's mandate to adapt the writ proceedings according to a petitioner's circumstances. *See Boumediene*, 553 U.S. at 779-80.

1. *The Evidentiary Standard*

The evidentiary rule adopted by the Court of Appeals for the Guantanamo habeas cases is clear: Everything offered by the parties is admitted into evidence. The Court of Appeals held that hearsay "is always admissible"; the issue is "what probative weight to ascribe to whatever indicia of reliability it exhibits." *Al-Bihani*, 590 F.3d at 879. The rule imposes no requirement on the government, however minimal, to demonstrate that it would be burdensome to prove enemy combatant status with non-hearsay evidence. The government is not even required to authenticate the hearsay it offers. The testimony of witnesses is not required under any circumstance. Thus, the detainee has no opportunity to confront the declarant(s) of the hearsay indiscriminately admitted into evidence against him.

This case shows the consequences of a zero-level admissibility threshold. The government offered a list of names found at the al Qaeda Tarnak Farms training camp as evidence that Awad received his training there. The District Court rejected the evidence as unreliable because it could not determine the significance of a name appearing on the list. App. 32, 36. Yet, the District Court later relied on that list as support for the proposition that Awad was "part of" al Qaeda. App. 38. Thus, the District Court continued Awad's nine-year detention indefinitely based on an inexplicable document. Like a particle in quantum physics, the Tarnak Farms list exists in simultaneous states of significance and

insignificance. What the District Court did and the Court of Appeals approved cannot constitute meaningful review of Awad's detention.

There is a stated requirement that the court may base its decision on only reliable hearsay. App. 12. This has proved to be no limitation at all because the Court of Appeals adopted the least demanding method of demonstrating reliability. Under its rule, one piece of unreliable evidence can be elevated to reliable status through another piece of evidence that itself is unreliable. *See Bensayah*, 610 F.3d at 726. Under the Court of Appeals' rule, there need not be even a single piece of evidence that possesses indicia of reliability to support a finding that a man is an enemy combatant, and on that basis to imprison him for an indefinite number of years, indeed, potentially for the rest of his life.

2. *The Standard Of Proof*

The law generally recognizes three standards of proof for different types of cases. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 423 (1979). On the other end of the spectrum, in a criminal case, "beyond a reasonable doubt" is used "to exclude as nearly as possible the likelihood of an erroneous judgment." *Id.* at 423-24. The intermediate standard is clear and convincing evidence, which is often used in civil cases involving allegations of quasi-criminal wrongdoing by the defendant and thus the "interests

at stake . . . are deemed to be more substantial than mere loss of money." *Id.* at 424.

No decision by this Court has ever approved using a standard less demanding than proof by clear and convincing evidence in a case involving prolonged detention. *See, e.g., Addington*, 441 U.S. at 427 ("the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"); *Woodby v. INS*, 385 U.S. 276, 286 (1966) (holding that alien deportation orders must be supported by "clear, unequivocal and convincing evidence"); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (stating that government must prove case by clear and convincing evidence in order to prevail in denaturalization proceeding).

When faced with the issue of proper standard of proof for potentially lifetime detention, the Court of Appeals chose the mere preponderance of the evidence standard for all cases involving Guantanamo detainees. The court first reached that conclusion in *Al-Bihani* and then reaffirmed it in this case. *Al-Bihani*, 590 F.3d at 878; App. 20-21.

Under the Court of Appeals' standards, an individual not engaged in enemy activity may be captured and detained for eternity by meeting the burden of proof used in a negligence action, but without the requirement of competent evidence that would be essential to prove liability in a fender bender. Awad asks this Court to consider whether those standards are sufficient for cases where someone could be, in effect, jailed for life.

C. In Adopting The Minimal Procedural Protections, The Court of Appeals Misinterpreted This Court's Prior Decisions

The procedural rules adopted by the Court of Appeals for all Guantanamo cases regardless of circumstance directly conflicts with *Boumediene* and *Hamdi*.

Boumediene mandates that the habeas court determine the appropriate inquiry in light of the circumstances of the petitioner's case. *Boumediene*, 553 U.S. at 789. But none of the Court of Appeals' Guantanamo decisions show that the court performed the balancing of interests that *Boumediene* requires or recognized that different circumstances of Guantanamo detainees require adaptation of the writ inquiry. The Court of Appeals adopted minimal procedural protections that are almost entirely focused on the government's interests. *Boumediene* recognizes that "[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military," but the Court made clear that those accommodations shall not "impermissibly dilut[e] the protections of the writ." *Id.* at 795.

A court could conceivably balance the competing interests of the detainees and the government and conclude that only the most minimal of protections are due to the detainees. The Court of Appeals, however, did not even do that much work. It interpreted the "center of the *Boumediene* opinion" to be the "primacy of independence over process." *Al-Bihani*, 590 F.3d at 880. As support, the Court of Appeals quoted this Court's statement that the

"'judicial officer must have adequate authority to make a determination in light of the relevant law and facts.'" *Id.* (quoting *Boumediene*, 553 U.S. at 787). According to the Court of Appeals, "meaningful review" is provided so long as the detainee has access to the federal courts; additional procedural protections are unnecessary. But the writ requires more than access to the courts for review to be meaningful. The beginning of the paragraph from which the Court of Appeals quotes states that "[t]he extent of the showing required by the Government in these cases is a matter to be determined." *Boumediene*, 553 U.S. at 787. *Boumediene* did not exalt independence over process; it left the critical question of process for another day and demanded that the lower courts face the issue squarely. That, the Court of Appeals has not done.

What process is appropriate to test whether a Guantanamo detainee is proven to be an enemy combatant and to reduce the risk of an erroneous detention? Consideration of two factors this Court has held to affect the scope of habeas review in other contexts shows why the Court should grant certiorari here and provide the lower courts with direction on how to implement "meaningful review."

1. *Prior Adjudication As A Factor In The Scope Of Habeas Review*

The overwhelming majority of habeas cases filed each year involve collateral attacks on prior criminal-court convictions and immigration proceedings. Guantanamo cases are nothing like either of those proceedings. The risk of erroneous deprivation in a Guantanamo case is higher than in the typical habeas case because there has been no

prior determination in a court or tribunal that uses evidence and burdens of proof that usually apply before sending someone off to jail.

Boumediene told the lower courts that the appropriate procedures for habeas review "depends upon the rigor of any earlier proceedings" in the case. *Boumediene*, 553 U.S. at 781. In *Al-Bihani*, the Court of Appeals ignored this crucial point, reasoning that the lowest burden of proof was appropriate for Guantanamo detainees because in "some domestic circumstances [the burden] has been placed *on the petitioner* to prove his case under a clear and convincing standard." *Al-Bihani*, 590 F.3d at 878. Essentially, if habeas law allows the burden to shift to a citizen-petitioner, the preponderance standard *a fortiori* protects a Guantanamo detainee. To support its conclusion, the Court of Appeals cited to 28 U.S.C. § 2254(e)(1), which concerns the federal review of a state court judgment. *Al-Bihani*, 590 F.3d at 878.

The Court of Appeals' analogy is wrong and its holding ignores *Boumediene*. Post-conviction habeas is nothing like a Guantanamo case. In habeas review after a criminal conviction, the state has already had to prove its case beyond a reasonable doubt. "[C]onsiderable deference is owed to the court that ordered confinement" because "it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding." *Boumediene*, 553 U.S. at 782. The Guantanamo cases are completely different because "the detention is by executive order," not by trial with due process protections. *Id.* "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive

detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

2. *Circumstances Of Capture As A Factor In The Scope Of Habeas Review*

All Guantanamo cases start with an elevated risk of erroneous detention. The level of risk varies with the circumstances surrounding the detainee's capture.

The Court of Appeals' approach fails because it lumps all Guantanamo detainees into a single class even though they are not all similarly situated. The same rule should not apply to an individual captured on the battlefield, to an individual surrendered at a hospital, and to an individual grabbed off the street in Pakistan. *Boumediene* requires the courts to adapt habeas review of enemy combatant claims to the new paradigm where the executive captures and detains people in scenarios other than active combat.

The increased risk of erroneous detention is due in large part to the government's expansion of the enemy combatant definition. The further the definition of enemy combatant moves away from individuals engaged in armed conflict on behalf of a nation state, the more difficult it is to distinguish between combatants and civilians. The traditional definition of enemy combatant arises from the classic paradigm of battlefield combat between the armed forces of nation states. This form of warfare involves strong indicia of affiliation with the armed force. Foremost among these is appearance on the battlefield fighting on behalf of the enemy force.

Other indicia of affiliation include wearing the uniform of the armed force and citizenship in one of the nation states at war. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1088 (2008) (noting that "the error rate of relatively casual procedures in a traditional war is thought to be relatively low because captured soldiers are likely to be in uniform"). Often, no inquiry into affiliation will even be necessary—the combatants will identify themselves as such to obtain the benefits that arise from prisoner-of-war status. *Id.* at 1089.

To date, this Court has used an enemy combatant definition based on these established law-of-war principles. The most recent example is in *Hamdi*, a case that the government characterized as a "classic wartime detention" involving an "archetypal battlefield combatant." Brief for the Respondents at 20-21, 28, *Hamdi*, 542 U.S. 507 (No. 03-6696). Based on the definition offered by the government, a plurality of the Court defined the term "enemy combatant" as "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and *who engaged in an armed conflict against the United States there*." *Hamdi*, 542 U.S. at 516 (emphasis added) (internal quotation marks omitted). The plurality determined that Hamdi could be classified as an enemy combatant because he "was carrying a weapon against American troops on a foreign battlefield." *Id.* at 522 n.1.

Ex parte Quirin, 317 U.S. 1 (1942), which *Hamdi* termed as the "most apposite precedent," 542 U.S. at 523, involved habeas challenges by German

saboteurs detained in the United States. At the direction of the German military, the saboteurs landed on the shores of the United States with explosives and the intent to destroy war industries and war facilities. *Quirin*, 317 U.S. at 21. The Court found that the saboteurs were enemy combatants because they engaged in hostile acts under the direction of the armed forces of the enemy. "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.* at 37-38.

The plurality in *Hamdi* recognized the traditional, limited definition of enemy combatant when it distinguished the case of *Ex parte Milligan*, 71 U.S. 2 (1866). There, the Court granted habeas relief to an American citizen who had been tried during the Civil War by a military commission for offenses including conspiring with a "secret society" to overthrow the government, liberate prisoners of war, and seize munitions of war. *Id.* at 6-7. The Court found that the petitioner was not an enemy combatant under the laws of war and therefore could not be subject to trial by a military commission. *Id.* at 131. In distinguishing the situation in *Hamdi* from *Milligan*, the plurality noted that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522.

In this case, the question of whether the detainee is an "enemy combatant" is not nearly as clear both because the government is using a broader definition

of "enemy combatant"[5] and due to the nature of the terrorist threat. Here, the government asserts that it can detain Awad because he is "part of" al Qaeda.[6] Unlike in *Hamdi*, the "enemy combatant" definition advanced here does not require that the detainee be "engaged in an armed conflict against the United States." *Hamdi*, 542 U.S. at 516. Without the requirement of a hostile act, in many cases it will be difficult to determine whether the detainee is an enemy or civilian. The nature of the "war on terror" renders this determination even more difficult. Traditional indicia of affiliation with enemy forces are of little, if any, use.

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[5] In *Hamdi*, the plurality stated that the lower courts would, in the first instance, define the permissible bounds of the "legal category of enemy combatant." 542 U.S. at 522 n.1. In 2009, the government gave a new label to the concept (whether the individual is "detainable") and ceased using the term "enemy combatant." For consistency with this Court's usage, the Petition will continue to use the term "enemy combatant."

[6] According to the government, the AUMF authorizes the President to "detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, (D.D.C. Mar. 13, 2009), Dkt. 1689. This Petition does not take a position on whether the government's attempt to broaden the definition of "enemy combatant" is within the scope of the Executive's detention authority under the AUMF.

Terrorists such as al Qaeda members are stateless fighters who do not wear uniforms. The difficulty of detection is exacerbated further because al Qaeda members try to blend into the surrounding community. "[T]hese factors make it much more likely that the traditional military detention process will result in erroneous detentions. The costs of such erroneous detentions are also higher in this war [because] . . . there is reason to believe the conflict could span generations." Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079, 1100 (2008). With no requirement of a hostile act, and with no prior adjudication by a court of record, greater procedural safeguards are needed to address the increased risk of erroneous detention.

The appropriate approach under *Boumediene* and *Hamdi* is one that balances the competing interests in light of the circumstances of the case, specifically the risk of erroneous deprivation. This does not lead to *ad hoc* judgments in each case. Categories will develop depending on the circumstances of the capture.

If the government makes a threshold demonstration by credible evidence that the individual was captured while engaged in armed conflict, reduced procedural safeguards may be appropriate. Viewed from the other perspective, the question is whether the individual had a plausible reason other than affiliation with the enemy to be in the location where he was captured.

Here, the government would be unable to make such a showing. Awad was not captured while fighting. He was in a civilian hospital, medicated,

and with an amputated leg. He had a plausible reason, unrelated to combat or activity hostile to the United States, to be in the hospital from which he was surrendered. The District Court found that he arrived at the hospital a month before the al Qaeda fighters overtook the hospital. App. 35-36. Furthermore, the District Court rejected the "only first-hand evidence offered by the government about Awad's capture" as "internally inconsistent [and] completely unreliable." App. 35.

If the government cannot make a threshold showing of engagement in armed conflict, the risk of erroneous detention is at its peak. *Boumediene* therefore requires a commensurate adaptation of the review and evidentiary standards of the habeas proceeding. In this circumstance, the appropriate standard of proof is clear and convincing evidence. The appropriate evidentiary approach is suggested by *Hamdi*, which teaches that hearsay "may need to be accepted as the most reliable evidence" available to the government. 542 U.S. at 533-34. Thus, when the government offers hearsay evidence, the government must demonstrate why the court should accept less reliable evidence than it typically would in habeas cases. This is consistent with the balancing approach approved in *Boumediene* and the procedure set out by Judge Hogan's Case Management Order ("CMO"), which was meant to govern the bulk of the Guantanamo habeas cases at the District Court level (although the District Court in this case did not follow the CMO): A party may rely on hearsay if that party establishes that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to

protect national security." Case Management Order, at II.C, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, (D.D.C. Nov. 6, 2008), Dkt. 940.

The Court of Appeals gave no consideration to those factors. This Court should provide guidance for this and future cases.

D. The Court of Appeals' Procedural Rules Do Not Provide A Meaningful Opportunity To Rebut The Government's Allegations

With no practical restriction on the quality of evidence and the same standard of proof used in personal injury cases, the detainee does not have a "meaningful opportunity" to rebut the government's allegations. *Boumediene* held that the procedures of the CSRT hearings fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." 553 U.S. at 767. The "most relevant" of deficiencies were "the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant." *Id.* at 783. For example, while detainees could theoretically confront witnesses that testified during the CSRT proceedings, "given that there are in effect no limits on the admission of hearsay evidence . . . the detainee's opportunity to question witnesses is likely to be more theoretical than real." *Id.* at 784.

The system adopted by the Court of Appeals is no better than the CSRT proceedings regarding the detainee's opportunity to rebut the government's allegations. True, unlike the CSRT proceedings, the detainee has counsel, but for the detainee to have a

meaningful ability to rebut the government's factual assertions, the government should have to present evidence of a sort that, if false, can be disproved. The Court of Appeals' system does not meet this test.

The only purported restriction on evidence that can support detention in Guantanamo is that it must be reliable. As this Court has held in another context, however, "reliability" is no restriction at all. "Reliability is an amorphous, if not entirely subjective, concept" that is highly unpredictable. *Crawford v. Washington*, 541 U.S. 36, 63 (2004). It is an "open-ended balancing test[ ]" with a "[v]ague standard" that is "manipulable." *Id.* at 68.

That is particularly true under the Court of Appeals' rule, where reliability can be proved in a generalized fashion based on other evidence. The Court has rejected this "bootstrapping" approach before, finding that corroborating evidence does not provide "any basis . . . for presuming the declarant to be trustworthy." *Idaho v. Wright*, 497 U.S. 805, 823 (1990). The result of the Court of Appeals' rule in Guantanamo cases is an elusive test where a person can be detained potentially for life without a single piece of evidence that is itself reliable. For all practical purposes, the Court of Appeals created a presumption—an irrational one—that the government's evidence is reliable.[7]

To illustrate: In this and other Guantanamo cases, the government typically proves enemy

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[7] In *Boumediene* this Court recognized that one of the central defects of the CSRT/DTA process was that the "Government's evidence is accorded a presumption of validity." *Boumediene*, 553 U.S. at 767.

combatant status using raw or unfinished intelligence reports consisting of either interrogator's notes summarizing a subject's purported statements during an interrogation session or notes by intelligence gatherers about documents recovered during hostilities. In the District Court, the government asserted that the *unfinished* intelligence reports it submitted were reliable because they were created during the intelligence gathering process. App. 29. But the government's sworn declaration in this case (JA-793) states that raw or unfinished reports are only the *first step* in an "intelligence cycle" that ends with reliability assessments made by intelligence analysts. There is no indication in the record that the originating agencies performed even a feeble check of the reports to determine if they contained reliable information.

This Court should consider whether the Court of Appeals' evidentiary standard comports with *Boumediene's* directive that the habeas petitioner receive a "meaningful opportunity" to challenge his detention. The record here shows that detainees in this situation have no meaningful way to rebut the government's case. As with the CSRT proceedings, no witness from the government testified in this or virtually any other Guantanamo habeas proceeding. Without witnesses to confront, there is no opportunity for cross-examination. Furthermore, with no witness laying the foundation for evidence, counsel for the government in essence testifies about the evidence and what it means. Thus, the detainee is presented with the daunting task of rebutting unsworn statements made under unknown circumstances that are purportedly summarized in a document.

In this case the government relied heavily on interrogation reports of a former detainee, al Joudi. The government admitted that many of the statements attributed to al Joudi were lies he told in an attempt to exculpate himself, i.e., contending that he was not part of the al Qaeda group. *See* App. 14. The government argued, however, that all of the purported statements inculpating others, including Awad, were true. In a traditional evidentiary context, this Court has found that self-exculpatory statements implicating others are "presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). Cross-examination was not an option here. Instead, Awad is detained based on unsworn statements attributed to an enemy combatant, who the government conceded was untruthful as to his own status and conduct. Those purported statements appear in a summary by an unknown agent that was neither reviewed nor adopted by the enemy combatant declarant. This is so far off the scale of reliable evidence that there is no word in the lexicon to describe it.

The risk of erroneous deprivation of liberty is high in a case like Awad's. That risk of erroneous deprivation increases exponentially when the preponderance of the evidence standard is applied. According to the District Court (and affirmed by the Court of Appeals), a "gossamer thin" case with evidence that "has very little weight" is sufficient to meet the preponderance burden and indefinitely detain Awad. App. 38. This Court has stated that in cases, such as this one, "involving individual rights, whether criminal or civil, 'the standard of proof [at a minimum] reflects the value society places on

individual liberty.'" *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)). The driving principle in *Boumediene* is that "[s]ecurity subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Boumediene*, 553 U.S. at 797. The Court of Appeals' preponderance standard denigrates the value that *Boumediene* placed on individual liberty by approving "no higher degree of proof than applies in a negligence case." *Woodby*, 385 U.S. at 285.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Diana M. Rutowski
Orrick, Herrington & Sutcliffe LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
(212) 506-5000
jewald@orrick.com

Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ADHAM MOHAMMED ALI AWAD,
Detainee, U.S. Naval Base, Guantanamo Bay, Cuba,
Appellant

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, et. al,.
Appellees.

No. 09-5351.

Decided June 2, 2010.

John L. Ewald argued the cause and filed the briefs for appellant. *Catherine Y. Lui* entered an appearance.

August E. Flentje, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief was *Robert M. Loeb*, Attorney.

Before: SENTELLE, *Chief Judge*, GARLAND, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Adham Mohammed Ali Awad, a detainee at Guantanamo Bay, Cuba, appeals from the district court's denial of his petition for a writ of habeas corpus. We find no reversible error in the district court's finding that Awad was "part of" al Qaeda in December of 2001. Awad admits that he traveled to Afghanistan in mid-September 2001 for the purpose of engaging in armed conflict against U.S. and allied forces. Evidence from multiple sources clearly supports the proposition that in December of 2001 Awad joined a group of al Qaeda fighters who had barricaded themselves inside a hospital and that these al Qaeda fighters treated Awad as one of their own. The correctness of the district court's factual findings is further confirmed by the appearance of Awad's name on several al Qaeda documents. We also reject Awad's challenges to the district court's legal holdings as the issues have already been resolved by a prior decision of this court. Accordingly, we affirm the district court's denial of Awad's petition for a writ of habeas corpus.

I. BACKGROUND

A. Legal Framework

In the wake of the terrorist attacks of September 11, 2001, the Congress of the United States passed a joint resolution "[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the

terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"). Acting under the authority of the AUMF, the United States initiated a military campaign in Afghanistan against the Taliban regime and the al Qaeda forces it protected. In pursuit of this campaign and in other parts of the world, still acting under the AUMF, the United States has captured and detained members of the enemy force. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-524, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality op.).

The United States houses some of the detainees it captures at a secure military base at Guantanamo Bay, Cuba. The proper role of federal courts in evaluating the military's long-term detention of individuals held at Guantanamo Bay has developed over the past decade and has involved all three branches of government. The history of the litigation over the jurisdiction of federal courts to review the United States's detention of individuals at Guantanamo Bay is set forth in *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2240-42, 171 L. Ed. 2d 41 (2008), and we need not repeat the history here. *Boumediene* settled the question of our jurisdiction by holding that United States courts do have jurisdiction to entertain petitions for writs of habeas corpus from such prisoners. The present case involves such a petition.

B. The Events at Mirwais Hospital

On or about December 7, 2001, a small number of injured al Qaeda fighters (around nine) entered the Mirwais Hospital in Afghanistan. These fighters went to the second floor, barricaded themselves inside, and held their position through the display of weapons and the threat of killing everyone in the building. Local Afghan and allied forces laid siege to the hospital to try and break the al Qaeda barricade. This siege was to last for almost two months. During this time, the part of the hospital not under al Qaeda control continued to function and treat patients.

Only two people left the barricaded area alive. On December [redacted], 2001, Majeed al Joudi ("al Joudi"), purportedly one of the al Qaeda fighters, was tricked into leaving the barricaded area and was captured by Afghan forces. His captors quickly turned him over to United States forces. Interrogators obtained a number of statements from al Joudi during subsequent interrogations. Then on December [redacted], 2001, the al Qaeda fighters surrendered a man with an amputated right leg to the Afghan forces at the hospital. This man was quickly transferred to U.S. control. During subsequent interrogation, the United States was able to identify this man as Adham Mohammed Ali Awad ("Awad"), a Yemeni national who had traveled to Afghanistan in mid-September 2001, and the petitioner before us.

The siege on the hospital continued for another month. In early January, one of the al Qaeda

fighters was killed by his own grenade as he attempted to escape from the barricaded area. The standoff finally ended the last week of January 2002, when Afghan and allied forces killed the remaining al Qaeda fighters and retook the area of the hospital they had held.

C. This Litigation

Awad, who has been held at Guantanamo Bay, Cuba, since shortly after his capture in 2001, filed a petition in 2005 for a writ of habeas corpus in the United States District Court for the District of Columbia. The district court stayed Awad's petition during the jurisdictional litigation leading to *Boumediene*. After *Boumediene* established that federal courts have jurisdiction to hear petitions for writs of habeas corpus from detainees at Guantanamo Bay, the district court lifted the stay of Awad's case.

The government responded to Awad's petition and asserted that it had the authority to detain Awad under the AUMF. As part of its defense of its detention of Awad, the government filed a factual return in the district court.

The government introduced into evidence multiple statements from Awad's interrogations. Awad told his interrogators that he was born in 1982 in Khor Maxar, Yemen. He traveled to Kandahar, Afghanistan in mid-September 2001. In either November or December of 2001, he was injured in an air raid; his injuries were serious enough to require eventual amputation of his right leg. At multiple

times, Awad told his interrogators that his purpose in traveling to Afghanistan was to receive weapons training and to fight U.S. and allied forces. *See* ISN 88 Knowledgeability Brief (Feb. 6, 2002) ("he went to Afghanistan to become a fighter,"); ISN 88 SIR (July 23, 2005) ("I went there [to Afghanistan] for two reasons: to visit an Islamic nation, and to have weapons training."); ISN 88 SIR (July 8, 2008) (the purpose of his trip was to "relax, gain weapons training and join the fight in Afghanistan.").

The government also introduced into evidence a list of names known as the "Tarnak Farms Document." It is undisputed that Tarnak Farms was an al Qaeda training camp in Afghanistan that provided advanced weapons training to militants. When U.S. and allied forces captured the facility, they found a 100-page undated document. One of the items within the document was a list of names. In the list of names, the name "Abu Waqas" was listed twice, with one of the entries being crossed out. The government alleges that "Abu Waqas" is Awad's *kunya*, his honorific or pseudonym. Along with the list of names, this document also contained: "Notes from a weapons course. Instructions in small arms such as AK47, M16, S.V.D. sniper rifle, rocket launchers such as RPG2, RPG7, HAN, Z.K.I. Notes on aiming and distance calculations. Notes on types of ammunition and its specifications. Instruction from a sniper-training course." Joint Appendix 591-92.

The government also introduced several statements of al Joudi, the other person captured at Mirwais Hospital. On December [redacted], 2001

([redacted]), al Joudi gave his interrogators the names and descriptions of the eight al Qaeda fighters he had seen in the Mirwais Hospital. One of the descriptions was of "Abu ((Wakaas)), a 28-year old Yemeni male; had his right leg amputated." Dec. [redacted], 2001 interrogation report of al Joudi. The government alleges that "Abu ((Wakaas))" is another transliteration of Awad's *kunya*. Five of the names provided by al Joudi (including Awad's) match with names on the list in the Tarnak Farms Document.

[redacted]

[redacted]

To further bolster its case, the government introduced into evidence contemporaneous news reports describing what occurred at the Mirwais Hospital. Several of these news reports provided the general background of the siege at the hospital and the events that occurred within. *See* Thomas E. Ricks and Karl Vick, *U.S. Reports Calm in Afghanistan on Christmas Eve; At Kandahar Hospital, Arrest Brings Gunfire*, WASH. POST,, Dec. 25, 2001, at A21; Drew Brown, *Armed Patients, Not the Sick, Biggest Concern at Hospital*, MIAMI HERALD, Dec. 26, 2001, at 21A.

Some of the other news articles directly implicate Awad as being part of the al Qaeda force at the hospital. One article described how the al Qaeda fighters "turned over a sick comrade yesterday, saying they could not care for him . . . The fighters surrendered their comrade because they believed his

amputated leg had become infected, witnesses said." Drew Brown, *Al-Qaeda Group Holed Up in Hospital; The Seven Wounded Fighters Threatened to Commit Suicide. One Seriously Injured Man was Released.*, PHIL. INQ., Dec. 30, 2001, at A10. The reporter went on to quote an eyewitness to the exchange who described the al Qaeda fighters as saying when handing over the man with the amputated leg: "He is our friend, but we cannot take care of him, so we must turn him over to you, regardless of what you do with him." *Id.* Another news report quoted a doctor who went in to talk to the people behind the barricade. Karl Vick, *For Al Qaeda Patients, Cautious Care; With Grenades Strapped to Their Sides, Injured Fighters Focus Wrath on U.S.*, WASH. POST, Dec. 20, 2001, at A27. The doctor reported that all the people said: "We have just one way, and that is jihad against America." *Id.*

In support of his petition, Awad introduced into evidence an unsigned "affidavit," a declaration from his counsel, and additional statements he made to his interrogators. Awad argued that he had purposes in going to Afghanistan other than to fight U.S. and allied forces. He contended that while he traveled to Afghanistan to fight, he did not succeed in his goal of joining the fight. He claimed that he was injured by an airstrike while walking through a market in Kandahar, not near the Kandahar airport as the government maintains. Awad asserted that he went to the hospital for care, and in some way ended up behind the barricade. He denied having become "part of" al Qaeda. After making their filings, the parties cross-filed for judgment on the

record. The district court held a hearing on the parties' cross-motions on July 31, 2008.

On August 12, 2009, the district court entered a memorandum order denying Awad's petition for a writ of habeas corpus. *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C.2009). The district court said that it "formally 'received' all the evidence offered by either side but . . . assessed it item-by-item for consistency, the conditions in which the statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay." *Id.* at 23. The district court dealt first with the legal issues in the case. It held that the government had the burden of establishing by a preponderance of the evidence the lawfulness of Awad's detention. *Id.* at 23-24. The court also held that the government's authority to continue to detain Awad depended on the continuation of hostilities, not on the individual threat posed by Awad if he were released. *Id.* at 24.

The court then proceeded to its factual analysis. The court found that the reason Awad went to Afghanistan was to "join Al Qaida to fight against the U.S. after the September 11 attack on the World Trade Center." *Id.* With regard to the Tarnak Farms Document, the court rejected Awad's denial that the name "Abu Waqas" referred to him because he had identified himself with such a name previously. *Id.* But the court found the government's claim that Awad had received training at Tarnak Farms unsupported because "[w]e do not know the purpose of the list or when it was written." *Id.* at 25.

The court made a factual finding that Awad was injured on November 1 or 2, 2001 and went to the hospital shortly thereafter. *Id.* at 26. The court then discussed the remaining evidence. *Id.* at 26-27. [redacted] The court concluded, based on all these factual findings, that "it appears more likely than not that Awad was, for some period of time, 'part of' al Qaida. At the very least Awad's confessed reasons for traveling to Afghanistan and the correlation of names on a the [sic] list and [redacted] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade." *Id.* The district court denied his petition for a writ of habeas corpus. *Id.* Awad appeals from this adverse judgment.

II. ANALYSIS

Awad makes several legal and factual challenges to the district court's decision. Before considering the legal challenges, we will first address Awad's challenges to the factual findings of the district court.

A. Evidentiary Challenges

Awad makes three types of evidentiary arguments. First, he challenges the district court's reliance on certain individual pieces of evidence. Second, he defends two of the district court's factual findings that were favorable to him. Third, he argues that considering all of the evidence before the court, it was clear error to find that he was "part of" al Qaeda through his actions behind the barricade in

Mirwais Hospital. We will consider these challenges in turn.

We review a district court's factual findings for clear error, regardless of whether the factual findings were based on live testimony or, as in this case, documentary evidence. *See Anderson v. City of Bessemer*, 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). "We further note that '[t]his standard applies to the inferences drawn from findings of fact as well as to the findings themselves.'" *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1294 (D.C. Cir. 2010) (*quoting Halberstam v. Welch*, 705 F.2d 472, 486 (D.C. Cir. 1983) (alteration in *Overby*). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Boca Investerings Partnership v. U.S.*, 314 F.3d 625, 629-30 (D.C. Cir. 2003) (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). But "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it ... Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Overby*, 595 F.3d at 1294 (*quoting City of Bessemer*, 470 U.S. at 573-74, 105 S. Ct. 1504)) (omission in *Overby*).

We will begin with Awad's challenges to the individual items of evidence. In evaluating these challenges, we do not weigh each piece of evidence in

isolation, but consider all of the evidence taken as a whole. *Cf. United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999) ("[W]e have been mindful of our responsibility to evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record.").

Awad makes a general attack that the district court committed error in relying upon unreliable hearsay evidence. This general attack, however, does not further Awad's case. We have already held that hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable. *See Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) ("[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible-it is always admissible-but what probative weight to ascribe to whatever indicia of reliability it exhibits."). The Supreme Court's plurality opinion in *Hamdi*, 542 U.S. at 533-34, 124 S. Ct. 2633, expressly states:

> [T]he exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.

Thus, the fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance

on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay. This Awad has not done.

The district court relied upon the Tarnak Farms Document to corroborate the statements of al Joudi and [redacted] Awad alleges it was error for the district court to use the Tarnak Farms Document for any purpose, as it had previously refused to rely on the Tarnak Farms Document to show that Awad trained at Tarnak Farms. Awad misreads the district court's opinion. The district court did not hold that the Tarnak Farms Document was useless or unreliable. The district court only found that the document was not necessarily a list of trainees, so it could not substantiate a finding that Awad trained at Tarnak Farms. 646 F. Supp. 2d at 25. But such a finding does not preclude the district court from using the document for other purposes. Even though the district judge did not know what the purpose of the list of names was, he knew that it was a list found in an al Qaeda document discovered at a terrorist training camp that contained two listings of Awad's *kunya*. Awad does not challenge the district court's factual finding that the references in the document are to him. The district court took the Tarnak Farms Document, considered the circumstances of the document, and weighted it accordingly in its analyses of the various questions with which it was presented. It was not error for the district court to find the document relevant on some issues, but not others.

Awad attacks the district court's reliance on statements of al Joudi. Awad asserts that the

government assessed al Joudi was lying when he denied his own involvement in al Qaeda, and therefore, none of his statements should be believed. But al Joudi made two types of statements: he made statements exculpating himself and statements incriminating others. The government interrogators noted disbelief of al Joudi's exculpatory statements, but made no such notations as to al Joudi's statements incriminating others. Awad argues that since the government assessed al Joudi to be a liar on one topic (whether he was part of al Qaeda), it was clear error to rely on his statements about different topics (whether others were part of al Qaeda).

Such an argument is contrary to long established analysis of witness testimony. It is a standard jury instruction that a juror can choose to believe all of what a witness says, some of what a witness says, or none of what a witness says. *See U.S. v. Glover*, 731 F.2d 41, 44 n. 6 (D.C. Cir. 1984) ("You are the sole judge of the credibility of the witnesses. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed.") (quoting Criminal Jury Instructions for the District of Columbia, Instruction 2.11). In al Joudi's case, it accords with common sense that he may have had a motivation to lie about his own involvement in nefarious activity but not have the same motivation to lie about the involvement of another.

Of course, the fact that a witness may have lied on one topic may be considered in determining the credibility of his statements about other matters.

But that assessment, that weighing, is for the finder of fact. Our review of the fact finder's decision to credit some of the statements of an individual but not others is reviewed for clear error. Awad makes no showing that the district court committed clear error in crediting al Joudi's statements identifying the al Qaeda fighters inside the hospital.

Awad attacks the district court's reliance on correlation of names among the al Joudi list, the Tarnak Farms Document, and [redacted] because the names in the various lists do not match perfectly. But the government need not, and does not, assert that there is perfect correlation. Rather, the government asserts just what the district court found: the correlation of names on the lists is too great to be mere coincidence. There is no requirement of 100% overlap for one document to corroborate another. The listing of identical names in the [redacted] and in al Joudi's list indicates that al Joudi's statements identifying the other al Qaeda fighters were reliable. The district court did not err in finding that the correlation among names in the four lists lent credibility to al Joudi's statements identifying the al Qaeda fighters.

Awad defends two favorable factual findings of the district court: that Awad did not train at Tarnak Farms and that Awad arrived at Mirwais Hospital one month before the al Qaeda fighters arrived. The first argument is not relevant to our review; the government is not challenging the district court's factual finding that Awad did not train at Tarnak Farms and is not placing any reliance upon any such

training for its authority to continue to detain Awad pursuant to the AUMF.

As to the second argument, regarding when Awad arrived at the hospital, the district court found that Awad arrived at the hospital on or about November 1, 2001. 646 F. Supp. 2d at 26. The government argues that this factual finding was clearly erroneous and that he arrived in the first week of December along with the group of al Qaeda fighters who created the barricade. We need not decide this issue, as it does not affect the outcome of the case. The government's evidence that Awad was "part of" al Qaeda does not depend on when Awad arrived at the hospital. Rather, the factual assertion is simply that when the al Qaeda fighters took over part of Mirwais Hospital, Awad joined them behind the barricade. The truth of that assertion is unrelated to his arrival date. It is immaterial whether Awad had already been at the hospital for a month, a week, or a day. This factual issue is irrelevant to whether Awad was "part of" al Qaeda. None of Awad's evidentiary arguments demonstrate clear error by the district court.

We next consider whether the district court, in light of *all* of the evidence, made an erroneous finding that Awad was "part of" al Qaeda. Reviewing all the evidence, it is plain that the district court made no error in its ultimate conclusion. Awad's statements of intent are undisputed. Awad repeatedly told U.S. interrogators that the reason he traveled to Afghanistan in mid-September 2001 was to join the fight against U.S. and allied forces. The district court found that the

reason Awad traveled to Afghanistan was to fight, and Awad does not challenge that finding on appeal. The government acknowledges that intention to fight is inadequate by itself to make someone "part of" al Qaeda, but it is nonetheless compelling evidence when, as here, it accompanies additional evidence of conduct consistent with an effectuation of that intent.[1]

Other unchallenged evidence includes Awad's concession that he "was surrendered by the insurgents and detained by Afghan forces at Mirwais Hospital on December [redacted], 2001 . . . ." Appellant's Br. 5. The further evidence of the events at the hospital underscores how incriminating this concession is. A group of al Qaeda fighters took over part of the Mirwais Hospital. The part of the hospital not under al Qaeda control continued functioning and treating patients. Awad admits that he was "surrendered by the insurgents." This supports the district court's understanding that Awad was behind the al Qaeda barricade at the Mirwais Hospital. If Awad had not been behind the barricade with the al Qaeda fighters, he could not have been "surrendered" to U.S. allied forces. Awad could simply have left. But, as he tells us, he was surrendered by al Qaeda forces. The district court could properly find that Awad was behind the barricade with the al Qaeda fighters.

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[1] Of course, the AUMF grants authority to the President to detain individuals for reasons other than for being members of al Qaeda or the Taliban.

The district court also had before it evidence identifying Awad as one of the al Qaeda fighters. The statements of al Joudi identified Awad as being one of the al Qaeda fighters. This identification even specifically identified that Awad had an amputated leg. The [redacted] corroborates this identification because of the overlap of names.

Both the [redacted] and the Tarnak Farms Document include names used by Awad. Awad does not challenge the district court's factual finding that he used those names on appeal. While the appearance of his name on al Qaeda documents may not, by itself, be adequate to support a factual finding that he was "part of" al Qaeda, it certainly provides support for the district court's overall factual conclusion that Awad was "part of" al Qaeda.

The court also had before it multiple news reports. These accounts support the finding that Awad was one of the al Qaeda fighters. While the news reports are hearsay, the district court could properly treat them as reliable. The reports were written contemporaneously with the events that occurred. The reporters who wrote the articles in December of 2001 had no reason to even imagine that the events occurring at the hospital would eventually be at issue in a court of law of the United States. They had no reason to falsify their reports. The information in the reports is hearsay, but as we discussed above, hearsay may be relied upon in this type of proceeding if the district court has reason to believe that the hearsay is reliable.

To summarize, the evidence before the district court was that: Awad traveled to Afghanistan for the purpose of fighting against U.S. and allied forces; he was with the al Qaeda fighters behind the barricade in the hospital; he was surrendered by the al Qaeda fighters; al Joudi, who was there, identified him as being one of the al Qaeda fighters; al Joudi's statements were corroborated by documentary evidence; and Awad's name appeared in two highly relevant pieces of documentary evidence. Additionally, contemporaneous newspaper reports identified Awad as one of the al Qaeda fighters. Against this evidence, the district court had only Awad's self-serving statements of innocence, which the district court, as finder of fact, did not credit.

Determining whether Awad is "part of" al Qaeda is a mixed question of law and fact. Whether our review of the district court's finding on this question is *de novo* or for clear error does not matter in this case because the evidence is so strong. Simply recounting the evidence establishes that under either standard of review, the district court's conclusion that Awad was "part of" al Qaeda was not erroneous. Awad has not come close to meeting his burden of showing reversible error in the district court's finding that Awad was "part of" al Qaeda at Mirwais Hospital during December 2001.

B. Legal Challenges

Awad challenges three of the district court's legal holdings. These we review *de novo*. *See Al-Bihani*, 590 F.3d at 870. First, Awad challenges the district court's holding that the government must prove its

authority to continue to detain him by a preponderance of the evidence. He argues that the government has to meet its burden by clear and convincing evidence. He is incorrect. We have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo Bay, Cuba. *See Al-Bihani*, 590 F.3d at 878 ("Our narrow charge is to determine whether a preponderance standard is unconstitutional. Absent more specific and relevant guidance, we find no indication that it is.").

The *Al-Bihani* holding follows the Supreme Court's guidance to lower courts in the Hamdi plurality. *See Hamdi*, 542 U.S. at 534, 124 S. Ct. 2633 ("Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant."). Our precedent in *Al-Bihani* is clear, and "[w]e, of course, are without authority to overturn a decision by a prior panel of this Court." *Louisiana Public Service Comm'n v. FERC*, 522 F.3d 378, 390 (D.C. Cir. 2008). Awad seems to argue that there is some uncertainty in the evidentiary standard. Lest there be any further misunderstandings, let us be absolutely clear. A

preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF.[2]

Awad next argues that the district court erred in denying his petition without a specific factual finding that Awad would pose a threat to the United States and its allies if he were released. Again, *Al-Bihani* forecloses this argument. *Al-Bihani* makes plain that the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities. 590 F.3d at 874. Awad again attempts to insert uncertainty into this court's prior holding where there is none. Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.

Awad's last challenge is that it is not enough that he was found to be "part of" al Qaeda. He argues that there must be a specific factual finding that he was part of the "command structure" of al Qaeda. There is no such requirement under the AUMF. *See* AUMF ("That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines

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[2] Like the *Al-Bihani* court, 590 F.3d at 878 n.4, we note that our analysis here does not establish that preponderance of the evidence is the constitutionally required minimum evidentiary standard.

planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."). Nowhere in the AUMF is there a mention of command structure.

The distinction here is between defining what is necessary and what is sufficient. If the government can establish by a preponderance of the evidence that a detainee was part of the "command structure" of al Qaeda, this satisfies the requirement to show that he was "part of" al Qaeda. But there are ways other than making a "command structure" showing to prove that a detainee is "part of" al Qaeda. For example, if a group of individuals were captured who were shooting at U.S. forces in Afghanistan, and they identified themselves as being members of al Qaeda, it would be immaterial to the government's authority to detain these people whether they were part of the "command structure" of al Qaeda. Once Awad was "part of" al Qaeda by joining the al Qaeda fighters behind the barricade at the hospital, the requirements of the AUMF were satisfied. *See Al-Bihani*, 590 F.3d at 872 (holding that under the AUMF, a person may be lawfully detained if, *inter alia*, he was "part of" al Qaeda forces). Awad points us to no authority from this court or the Supreme Court that would counsel a different decision.

III. CONCLUSION

The federal judiciary now has the duty of evaluating the United States military's detention of

those it deems part of enemy forces. Because of the unique nature of the conflict in which the United States is now involved, the Supreme Court has recognized that we may need to alter or amend our normal procedures to accommodate the important national security and practical concerns created by bringing these cases before Article III courts. In some cases district courts have ordered detainees released for lack of evidence, but this is not such a case. Awad admits that the reason he traveled to Afghanistan was to join the fight against U.S. and allied forces. He then succeeded in that goal by joining a group of al Qaeda fighters who took over part of a hospital and barricaded themselves therein. We also reject Awad's legal challenges. Prior decisions of this court clearly hold that a preponderance of the evidence standard is constitutional and that there is no requirement that the government must show that a detainee would be a threat if released in order to detain him. Further, Awad points us to no legal authority for the proposition that he must be a part of al Qaeda's "command structure" to be detained. Accordingly, we affirm the district court's denial of his petition for a writ of habeas corpus.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

ADHAM MOHAMMED ALI AWAD,
Petitioner

v.

BARACK H. OBAMA, et al.,
Respondents.

No. 05-CV-2379.

Aug. 12, 2009.

MEMORANDUM ORDER
DENYING WRIT OF HABEAS CORPUS

JAMES ROBERTSON, District Judge.

Adham Mohammed Al Awad, a citizen of [b(1), b(6) redacted] alleges that he is illegally detained at Guantanamo Bay Naval Base and petitions this Court for a writ of *habeas corpus* to secure his release. The parties have cross-moved for judgment on the record. The government's motion will be granted.

I. BACKGROUND

Awad has been in U.S. custody since his capture in Afghanistan on [b(2) redacted]. He filed his petition four years ago, but that petition and hundreds like it were put on hold until various legal issues, including the jurisdiction of this Court, were resolved. After the Supreme Court held that detainees like Awad have a right to bring habeas petitions and that federal district courts have jurisdiction to hear them, *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), and after Judge Hogan issued his omnibus Case Management Order that has guided the Guantanamo habeas cases' procedures, this case moved on to the merits.

The government filed a factual return asserting the grounds on which Awad is detained the claim is that he is an al Qaida fighter and the evidence supporting that claim. Awad then made several requests for discovery. I denied some of those requests outright and denied others without prejudice to their later renewal with the kind of specificity required of motions under Fed. R. Civ. P. 56(f). Awad submitted his traverse without renewing his discovery requests. Both sides then moved for judgment on the record and a hearing on those cross-motions was held on July 31, 2008.

The government's core narrative is that Awad volunteered or was recruited for Jihad soon after September 11, 2001 and traveled from his home in [b(1), b(6) redacted] to Afghanistan; that he trained at the Al Qaida "Tarnak Farms" camp outside

Kandahar; that Awad and a group of other Al Qaida fighters were injured in a U.S. air strike at or near the airport in Kandahar and went to Mirwais Hospital for treatment; that these men then barricaded themselves in a section of the hospital; that U.S. and associated forces laid siege to the hospital; that Awad's comrades gave him up because they could not care for his severely injured [b(1) redacted] and that, after Awad's capture, his al Qaida comrades fought to the death.

The government offers five groups of evidence in support of their narrative: (1) Intelligence reports of Awad's statements to interrogators; (2) statements of a former Guantanamo detainee named [b(1), b(6) redacted] who was inside Mirwais Hospital during the siege and who gave a list of names and descriptions of the Al Qaida fighters, including a man with an [b(1) redacted] who went by the name [b(1), b(6) redacted] [b(1), b(6) redacted]-a *kunya* allegedly associated with Awad[1]; (3) [b(1), b(6) redacted]; (4) a list found at Tarnak Farms bearing the name [b(1), b(6) redacted] and several of the names that also appear [redacted] on [b(1), b(6) redacted] list of names; and (5) newspaper articles published in American newspapers about the siege at Mirwais Hospital.

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[1] A *kunya* is a sort of traditional, honorific nickname. [b(3) redacted] Decl. at 2. A man's *kunya* will often be the word "abu"-literally translated to mean father and then the name of his first born child. *Id.* According to [b(3) redacted]. Al Qaida members also use *kunyas* as honorific pseudonyms. *Id.* These *kunyas* are not dependent on whether an individual is a father and are sometimes used to conceal a true identity.

Petitioner's story is that he traveled to Afghanistan in mid-September 2001 in order to visit another Muslim country for a few months, intending to return home after his visit; that in early November 2001 he was injured and knocked unconscious during an air raid while walking through a market in Kandahar; that he woke up in Mirwais Hospital after part of his [b(1) redacted]; that he was heavily medicated, floated in and out of consciousness, slept constantly, and could barely sit up; and that he remained in this condition until his capture.

Awad's case relies mostly on weaknesses and holes in the government's evidence, but, in support of his narrative, he submits an unsigned affidavit, a declaration from his counsel, and different intelligence reports of different statements made to interrogators.

II. LEGAL STANDARDS

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

A. Substantial Support

The government's position is that:

> [t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who *were part of*, or substantially supported, Taliban or *al-Qaida forces* or associated forces that are *engaged in hostilities against the United States or its coalition partners*, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondent's Revised Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at p. 3 (emphasis added).

In a thoughtful decision that has been followed by many if not most of the judges of this court, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), Judge Bates wrote that the "key inquiry" when analyzing the "part of . . . al Qaeda" test is "whether the individual functions or participates within or under the command structure of the organization—*i.e.* whether he receives and executes orders or directions." *Hamlily*, 616 F. Supp. 2d at 75 (internal citations omitted). I have adopted Judge Bates' approach.

B. Hearsay, Authenticity, Chain of Custody

The government's case relies on "raw" intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps not knowable). Awad argues that such evidence should excluded because the government has not made individualized showings that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security." CMO II(A). The government responds generally (not with individualized showings) that its intelligence documents are reliable because they were created during the intelligence gathering process and explains generally why the presentation of non-hearsay evidence would be a burden. The government urges that documents and reports generated for intelligence purposes should be accorded a presumption of reliability and credibility.

The suggestion of a presumption of reliability and credibility goes too far because it would seem to place the burden of rebuttal on the petitioner. I have instead formally "received" all the evidence offered by either side but have assessed it item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay. In other words, I have given the evidence the weight I think it deserves.

C. Burden of Proof

The government had the burden of proving the lawfulness of detention by a preponderance of the evidence. CMO II(A); *accord*, *Al Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009); *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009). The burden of proof never shifted to Awad. No inference was drawn from Awad's decision not to testify or from his failure to sign or swear to his affidavit.

D. Detention for the Continuation of Hostilities

I acknowledge the power of Judge Huvelle's argument in *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009), that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining battle," but I decline to follow it in this case and have not considered whether or to what extent the continued detention of Awad supports the AUMF's self-stated purpose of "prevent[ing] . . . future acts of international terrorism," Pub. L. 107-04, 115 Stat. 224. Awad is a marginally literate [b(1) redacted] who has spent more than seven of his twenty six years since he was a teenager in American custody. It seems ludicrous to believe that he poses a security threat now, but that is not for me to decide. Combat operations in Afghanistan continue to this day and in my view the President's "authority to detain for the duration of the relevant conflict" which is "based on longstanding law-of-war principles" has yet to "unravel." *See*, *Hamdi v.*

Rumsfeld, 542 U.S. 507, 521, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

III. THE EVIDENCE

A. "Then Why He Here"

[b(1) redacted] [b(1) redacted] *See*, [b(2) redacted] [b(2) redacted] [b(1), b(6) redacted] [b(1), b(6) redacted] [b(1), b(6) redacted][2] [b(2) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted] [b(1) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted] [b(1) redacted]; [b(2) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted]; [b(2) redacted] [b(1), b(6) redacted]

B. Training

The name "Abu Waqas" appears twice (once crossed out) on a list of names found in a one hundred page document retrieved from Al-Qaida's "Tarnak Farms" training camp in Kandahar sometime after that facility was taken by U.S. and associated forces.[3] [D(2) redacted] An intelligence

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[2] In his affidavit, Awad claims that any incriminating statements he made were made "as a result of torture, the threat of torture or coercion and are therefore unreliable." Awad Aff. ¶ 5; Jones Aff. ¶ 7. The only specific allegation of coercion is the claim that interrogators threatened to withhold medical treatment until Awad provided them information. The government retorts that interrogators' notes reveal that Awad was provided care and that he used his medical condition as an excuse to avoid answering difficult questions. [b(1), b(2) redacted]

[3] There is no dispute that Tarnak Farms was an Al Qaida camp that provided advanced training. *See, generally*, [D(3) redacted] Decl.

report states that the document also contains notes on small arms and sniper training instruction, and aiming and distance calculations. [C(2) redacted]

Awad denies any association with the name "Abu Waqas," but this denial is not credible. He has identified himself on at least one occasion as "Waqqas Adham Mohammed Ali Ala-Awad." ISN 88 FD-302 (May 4, 2002). [b(1) redacted] [b(1) redacted] [b(1) redacted] [b(2) redacted] [b(2) redacted] At the merits hearing petitioner's counsel fine-tuned the argument to an assertion that Awad never used the honorific "Abu" before "Waqas." That position is inconsistent with the other evidence. "Abu" appears before 53 of the 59 names on the Tarnak Farms list. [D(2) redacted] [D(3) redacted] Decl. at 2.

Except for the appearance of what seems to be his name on a list, however, the evidence that Awad received training at Tarnak Farms is nonexistent. We do not know the purpose of the list or when it was written. Even the translator claimed only that it was "possibly" a list of trainees. [D(2) redacted] [b(1) redacted] [b(1) redacted] [b(1) redacted] Awad Aff. ¶ ¶ 3-6; [b(2) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted]; [b(2) redacted] ("... never received any training."). [b(1), b(6) redacted] [b(2) redacted]. That account may be implausible, but, in the absence of better evidence on the government's side, I find the claim of Tarnak Farms training to be unsupported.

C. Mirwais Hospital

The government relies mostly on newspaper articles to provide background information on the

barricade and siege at Mirwais Hospital.[4] Awad has not asked that I disregard those articles, conceding that "they are informative on certain points." Tr 55:1-8. I will accordingly consider the articles sufficiently reliable on points that are not seriously disputed: that Al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital at some time during the first week of December 2001; that U.S. and affiliated forces laid siege to the hospital; and that the siege ended in late January 2002 when U.S. associated forces confronted and killed the remaining members of the Al Qaida group. I will also turn to these articles to fill in evidentiary gaps when there is corroboration.

Awad concedes that he was captured in the Mirwais Hospital on [b(1) redacted] Tr 53:21-25. The government's primary evidence of Awad's involvement that he participated in the siege is statements by [C(6) redacted] [C(6) redacted] a former Guantanamo detainee who claimed to have been inside the hospital and to have spoken with the al Qaida fighters. ISN [redacted] FD-302 (June 6, 2002); [C(2) redacted] [C(2) redacted] [redacted], who was captured on December 25, 2001 (and who denies

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[4] Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12; *Drew Brown, Al-Qauda Group Holed up in Hospital*, Phil. Inq., Dec. 30, 2001, at A10; Pamela Constable, *Kandahar Hospital Seige Ends in al Qaeda Deaths*, Wash. Post, Jan 28, 2002, at A12; Thomas E. Ricks & Karl Vicks, *U.S. Reports Calm in Afghanistan on Christmas Eve; At Kandahar Hospital, Arrest Brings Gunfire*, Wash Post, Dec. 25, 2001, at A21; *Drew Brown, Armed Patients, Not the Sick, Biggest Concern at Hospital*, Miami Herald, Dec. 26, 2001, at 21A.

that he was part of al Qaida), told interrogators that he was in Afghanistan working with the charity Al Wafa; that one day he was hit by a car; that he woke up in Mirwais Hospital in the same room as the Al Qaida fighters; and that they struck up a conversation. ISN [redacted] FD-302 (June 6, 2002). They told him that they were involved in a car wreck[5] while fleeing a U.S. airstrike and talked about their weapons, although never saw any. [C(2) redacted] [C(6) redacted] also provided names descriptions for the surviving eight members of the al Qaida group, including an [C(1), C(6) redacted] [C(1), C(6) redacted] *Id.* Four of the other names that [C(6) redacted] provided were identical to or transliterations of names listed near "Abu Waqas" on the Tarnak Farms document. *Compare*, [C(2) redacted] *with*, [D(2) redacted]

Awad was shown a picture of [redacted] but denied ever knowing him. ISN 88 FD-302 (October 15, 2002). [b(1), b(2) redacted] [b(1) redacted] [b(1) redacted] [b(2) redacted] Awad Aff. ¶ 8; [b(2) redacted] ("When the [U.S.] air-strikes began in the city of Kandahar [Awad was separated from Sugara] and he never saw him again. [Awad] was pulling someone from the rubble of a bomb destroyed building when he was injured . . . . He woke up in a hospital . . . ."). Awad asserts that after his leg was amputated he was "located near elderly patients and children" and that while at the hospital he was "semi-conscious and in continuous pain . . . [and was] on pain medication throughout [his] time in the

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[5] Apparently there are many bad drivers in Afghanistan.

hospital that made [him] sleep." Awad Aff. ¶ 14. He "denied being with the other Arabs . . . and offered that he was on the first floor of the hospital . . . [but] was later moved to the second floor . . . where there were other Arabs whom he did not know." ISN 88 FD-302 (October 15, 2002); Awad Aff. ¶¶ 12-13. [b(1) redacted] [b(1) redacted] [b(1) redacted]" Awad Aff. ¶ 16; [b(2) redacted] [b(2) redacted][6] ("No weapons or documents were found on" Awad when he was arrested), an assertion that is uncontested.

The only first-hand evidence offered by the government about Awad's capture was the report of a March 2006 interview with a [A(6) redacted] who claimed that he led the group that had taken Awad into custody. [A(6) redacted] FM40 (March 15, 2006). That report is internally inconsistent, completely unreliable, and is given no weight. [b(1) redacted] [b(1) redacted] [b(2) redacted] [b(2) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted]; [b(2) redacted] [b(2) redacted] [b(1) redacted] [b(1) redacted] [b(1) redacted] [b(2) redacted] [b(2) redacted] [b(2) redacted] [b(2) redacted] [b(2) redacted] [b(2) redacted] was a typographical error and that Awad's injury more likely occurred on December 2, 2001, the approximate date that the Al Qaida fighters barricaded Mirwais Hospital. Although there is some evidence to support this theory, *see*, ISN 88 [C(2) redacted] [C(2) redacted] (stating that the date of

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[6] [b(2) redacted] are derivative documents reflecting an accumulation of information from other sources. Tr 32:21-23.

"capture" was "3 weeks ago,"),[7] I will not credit this convenient explanation. It does not explain why the [b(2) redacted] states that Awad was injured on [b(2) redacted]. Nor does it explain why a different typo in the [b(2) redacted] was later corrected, while the [b(2) redacted] date was left unchanged. *Compare*, [b(2) redacted] *with*, [b(2) redacted] *see*, Res. MJR at 26.[8]

D. [redacted]

Up to this point, we have (a) a reasonable inference that Awad went to Kandahar to fight, (b) no reliable evidence that he was actually trained there, (c) undisputed evidence that he was in Mirwais Hospital during part of the siege, and (d) inconsistent evidence about how and when he arrived there. [redacted] Five of their names match names found on the list provided by [C(6) redacted] [C(6) redacted] and three of them match names found on the Tarnak Farms document. [redacted] [D(2) redacted] [D(2) redacted] *and* [C(2) redacted] [redacted] That remark finds corroboration in a newspaper account of a fighter who was killed trying to escape the siege at Mirwais *after* the date that Awad was

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[7] The parties are in general agreement that "capture" in this document should be read as "injury." Tr. 52:2-54:9; Res. Opp. 26-28.

[8] [b(1) redacted] [b(1) redacted] [b(1) redacted] [b(2) redacted] [b(2) redacted] Although this undermines the credibility of any information from that document, the government was unable to find the underlying document from which the November 1, 2001, date was taken. Tr 33:19-23. Because the November date is favorable to Awad and it is not refuted with equally strong evidence, I will assume it to be accurate.

captured. Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12.

[redacted][9,10]

Awad denies that [redacted] He denies having met al-Dhali or al-Fadhl. Awad Aff. ¶ 7. He argues that, because the siege at Mirwais Hospital was a well-publicized event, al-Dhali would have known that Awad was captured, and would not have guessed that he was hiding. Awad also points out [redacted]

The following table demonstrates the importance [redacted] The correlation among the names on the al Joudi list, the Tarnak Farms list, [redacted] is too great to be mere coincidence. The [redacted] believe, the points that tip the scale finally in the government's favor.

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[9] The government relies on an identification of [A(6) redacted] by another detainee given during an interrogation taken at Bargram, Afghanistan. ISN [A(2) redacted] FM40 (June 14, 2004).

[10] [redacted] the Guantanamo detainee told interrogators that he guarded the Kandahar Airport from after September 11, 2001, until mid-November 2001. ISN [redacted] FD-302 (November 1, 2002). Although Awad argues out that this would have prevented [redacted] from training at Tarnak Farms when Awad would have been there, that is not necessarily true. [redacted] said that he had trained at the Al Faruq camp, and it is logical that an Al Qaida guard would receive advanced training.

[C(6) redacted] **List**	[redacted]	**Tarnak Farms**	[redacted]
	[redacted]	**List**	[redacted]
[C(6) redacted]	[redacted]	[D(6) redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]	[redacted]
[C(6) redacted]	[redacted]	Abu Waqas	[redacted]
with an	[redacted]		[redacted]
amputated	[redacted]		[redacted]
right leg	[redacted]		[redacted]
	[redacted]		[redacted]
	[redacted]		[redacted]
[C(6) redacted]	[redacted]	[D(6) redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]		[redacted]
[redacted]	[redacted]		[redacted]

IV. CONCLUSION

The case against Awad is gossamer thin. The evidence is of a kind fit only for these unique proceedings [redacted] and has very little weight. In the end, however, it appears more likely than not that Awad was, for some period of time, "part of" al Qaida. At the very least Awad's confessed reasons for traveling to Afghanistan and the correlation of names on a list [redacted] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade.

The petition for writ of habeas corpus is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 09-5351 **September Term 2010**
1:05-cv-02379-JR
Filed On: September 1, 2010

ADHAM MOHAMMED ALI AWAD,
Detainee, U.S. Naval Base, Guantanamo Bay, Cuba,
Appellant

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, et. al,.
Appellees.

No. 09-5351.

BEFORE: Sentelle, Chief Judge, Garland, Circuit Judge, and Silberman, Senior Circuit Judge

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on July 19, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

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Supreme Court, U S
FILED
MAR 4 - 2011
OFFICE OF THE CLERK

No. 10-736

In the Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD, PETITIONER

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S KNEEDLER
Deputy Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys
Department of Justice
Washington, D C 20530-0001
SupremeCtBriefs@usdoj gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether intelligence reports and other "hearsay" evidence commonly used by the military to justify the detention of individuals captured abroad during armed conflict is admissible in habeas corpus proceedings challenging the detention of foreign nationals at Guantanamo Bay, Cuba, when a court determines that such evidence is reliable when considered in context.

2. Whether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings.

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In the Supreme Court of the United States

No. 10-736

ADHAM MOHAMMED ALI AWAD, PETITIONER

v.

BARACK H. OBAMA,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The unclassified version of the opinion of the court of appeals (Pet. App. 1-23) is reported at 608 F.3d 1. An unclassified version of the opinion of the district court (Pet. App. 24-38; App., *infra*, 1a-16a) is reported at 646 F. Supp. 2d 20.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2010. A petition for rehearing was denied on

[1] The version of the district court opinion published in the Federal Supplement and included in the appendix to the petition excludes material that was declassified after a review conducted during the appeal. The full unclassified version of the opinion is attached as an appendix to this brief

September 1, 2010 (Pet. App. 39). The petition for a writ of certiorari was filed on November 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. 1-23.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those conflicts, some persons captured by the United States and its coalition partners have been detained at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After *Boumediene*, the government filed a factual re-

turn to the habeas petition, and petitioner filed a traverse. Pet. App. 25.

3. Following a hearing, the district court denied the petition. App., *infra*, 1a-16a. As an initial matter, the court held that it would consider certain hearsay evidence introduced by the parties. The court explained that it had "formally 'received' all of the evidence offered by either side but [had] assessed it item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay," adding that it would "give[] the evidence the weight I think it deserves." *Id.* at 6a. The court declined to give a "presumption of reliability and credibility" to the government's evidence, reasoning that to do so would "go[] too far because it would seem to place the burden of rebuttal on the petitioner." *Ibid.*

The district court also held that "the government had the burden of proving the lawfulness of detention by a preponderance of the evidence." App., *infra*, 6a. The court emphasized that the "burden of proof never shifted" to petitioner under that standard, and that "[n]o inference was drawn from [petitioner's] decision not to testify or from his failure to sign or swear to" the statement he submitted to the court. *Ibid.*

The district court next looked in detail at the evidence tending to show that petitioner was part of al-Qaida. First, petitioner had told interrogators that he left his home country of Yemen and went to Afghanistan in September 2001 to train and to fight. App., *infra*, 7a-8a. The court reasoned that, given the timing and stated purpose of petitioner's travel, there was "support" for the conclusion that he "wished to join Al Qaida to fight against the U.S." *Id.* at 7a.

The district court then considered the government's allegation that petitioner had attended al-Qaida's Tarnak Farms training camp in Kandahar, Afghanistan. App., *infra*, 8a-10a. The government pointed out that the name "Abu Waqas" appeared on a list of names found at that camp, and the court agreed that petitioner had used that name. *Id.* at 8a-9a (noting that petitioner "denies any association with the name 'Abu Waqas,' but this denial is not credible"). The court also concluded that petitioner's "account of his whereabouts at the time the government believes he was at Tarnak Farms * * * may be implausible." *Id.* at 9a-10a. Nevertheless, without more evidence of "the purpose of the list or when it was written," the court found "the claim of Tarnak Farms training to be unsupported." *Ibid.*

Next, the district court examined the circumstances of petitioner's capture. App., *infra*, 10a-11a. It was "not seriously disputed" that "Al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital" in Kandahar "at some time during the first week of December 2001; that U.S. and affiliated forces laid siege to the hospital"; and that petitioner was captured there on December 29, 2001. *Ibid.* Another member of the al-Qaida group in the hospital, a man named al Joudi, was captured before petitioner and "provided names and descriptions for the surviving eight members of the al Qaida group, including" petitioner, whom he identified as "Abu Waqqas" and whom he correctly described as having "had his right leg amputated." *Id.* at 11a. Four of the names al Joudi provided "were identical to or transliterations of names listed near 'Abu Waqas' on the Tarnak Farms document." *Ibid.* In addition, contemporaneous news reports provided corroborative information about the siege. *Id.* at 10a.

Finally, the district court examined classified documents, including one containing names; the court observed that "[f]ive of the[] names match names found on the list provided by Al Joudi, and three * * * match names found on the Tarnak Farms document." App., *infra*, 14a. In the court's view, the "correlation among the names on the al Joudi list, the Tarnak Farms list, [and classified documents] is too great to be mere coincidence." *Id.* at 15a. The court reasoned that petitioner's "confessed reasons for traveling to Afghanistan and the correlation of names on * * * the list * * * clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade." *Id.* at 16a. The court therefore concluded that "it appears more likely than not that [petitioner] was, for some period of time, 'part of' al Qaida." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-23. As to the standard of proof, the court explained that "[w]e have already explicitly held that a preponderance of the evidence standard is constitutional in evaluating a habeas petition from a detainee held at Guantanamo." *Id.* at 20 (citing *Al-Bihani* v. *Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010)). In addition, the court of appeals held that the district court could consider hearsay "if the hearsay is reliable." *Id.* at 12 (citing *Al-Bihani*, 590 F.3d at 879). Having rejected petitioner's procedural challenges, the court of appeals also rejected petitioner's challenges to the district court's factual findings, reasoning that whether its review was "*de novo* or for clear error does not matter in this case because the evidence is so strong." *Id.* at 19.

ARGUMENT

Petitioner argues (Pet. 10-33) that district courts should not consider hearsay evidence in evaluating habeas corpus petitions brought by individuals detained at Guantanamo Bay under the AUMF, and that, in responding to such petitions, the government should be required to prove by more than a preponderance of the evidence that detention is proper. Those challenges to the procedures employed in Guantanamo habeas cases are essentially identical to the challenges made in another case in which a petition for a writ of certiorari has been filed, *Al Odah* v. *United States*, No. 10-439 (filed Sept. 28, 2010). As in *Al Odah*, the court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court.

To date, the district courts have issued decisions in habeas cases involving 59 detainees, granting writs of habeas corpus for 38 detainees and denying writs for 21 detainees. The D.C. Circuit has now issued decisions in nine cases, affirming the denial of writs of habeas corpus in four cases including this one, see *Al Odah* v. *Obama*, 611 F.3d 8 (2010), petition for cert. pending, No. 10-439 (filed Sept. 28, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (2010); *Al-Bihani* v. *Obama*, 590 F.3d 866 (2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); reversing the grant of a writ in one case, see *Al-Adahi* v. *Obama*, 613 F.3d 1102 (2010), cert. denied, 131 S. Ct. 1001 (2011); vacating the grant of a writ and remanding for further proceedings in two cases, see *Hatim* v. *Gates*, No. 10-5048, 2011 WL 553273 (Feb. 15, 2011); *Salahi* v. *Obama*, 625 F.3d 745 (2010); and reversing the denial of a writ and remanding for further proceedings in two cases, see *Warafi* v. *Obama*, No. 10-5170, 2011

WL 678437 (Feb. 22, 2011); *Bensayah* v. *Obama*, 610 F.3d 718 (2010). No D.C. Circuit panel has held that the admission of hearsay evidence, subject to the district court's assessment of its reliability and probative value, is improper in this unique context. And no D.C. Circuit judge or district court judge has concluded that a standard of proof more rigorous than preponderance of the evidence should apply.

In short, the lower courts have properly performed the task that this Court assigned them in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)—they have developed "procedural and substantive standards," *id.* at 796, for habeas proceedings for military detainees. Nothing in the Constitution or any other source of law requires the application of different standards or procedures. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in relying upon intelligence reports and other "hearsay" evidence in assessing the lawfulness of his detention. Specifically, he argues (Pet. 20) that a series of D.C. Circuit decisions holding that hearsay evidence is admissible and instructing the district court judges to assess the reliability and probative value of such evidence, see Pet. App. 17; *Al Odah*, 611 F.3d at 14; *Al-Bihani*, 590 F.3d at 879, "directly conflicts with *Boumediene* and *Hamdi*." That argument lacks merit.

a. This Court has recognized that habeas proceedings for detainees held by the military are unique, and that the standards and evidentiary rules that would apply in a domestic criminal case are not necessarily applicable in this context. See *Boumediene*, 553 U.S. at 783 ("Habeas corpus proceedings need not resemble a criminal trial."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that the "full protections

that accompany challenges to detentions in other settings may prove unworkable and inappropriate" in habeas proceedings for military detainees). In proceedings challenging the military's detention of individuals captured abroad during an armed conflict, information generated by the military—and by other agencies operating abroad—will generally be not only the most relevant and probative evidence, but often the only evidence bearing on the legality of the detention. It is appropriate for courts to consider the same types of evidence that the military necessarily uses when it makes detention decisions. See *id.* at 531 (plurality opinion) (noting that the "law of war and the realities of combat may render [military] detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Indeed, the *Hamdi* plurality strongly suggested that intelligence reports should, as a general rule, be admissible in habeas proceedings for detainees held by the military. The plurality explicitly recognized that the government could support the detention of a United States citizen with "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs," 542 U.S. at 534, such as the intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases, see *id.* at 538 (approving of hearsay evidence contained in declaration of government official). Likewise, this Court recognized in *Boumediene* that habeas proceedings are flexible and may be adapted to circumstances as necessary, including the unique military setting at issue here. 553 U.S. at 779 (stressing that "common-law habeas corpus was, above

all, an adaptable remedy"). The Court therefore noted that "accommodations can be made" in this exceptional context "to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ." *Id.* at 795. And the Court cautioned that, in developing "procedural and substantive standards," the lower courts should accord "proper deference * * * to the political branches." *Id.* at 796.

Adhering to *Hamdi* and *Boumediene*, the district courts and the court of appeals have developed a set of procedural rules to govern the habeas proceedings for the detainees held by the military at Guantanamo. As this case illustrates, within the context of these unique proceedings, district court judges generally admit and consider intelligence reports and other "hearsay" evidence, and assess its reliability and probative value. App., *infra*, 5a-6a. In making those case-specific and highly contextual assessments, the district courts have not blindly accepted the government's proffers. See *e.g.*, *Al Rabiah* v. *United States*, 658 F. Supp. 2d 11, 28-40 (D.D.C. 2009). Unlike juries, district court judges understand the limitations of certain types of hearsay evidence and have experience in evaluating the reliability of such evidence. Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 180 (1987) (holding that district courts may consider hearsay in assessing the admissibility of evidence); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964) (court may consider hearsay in issuing a search warrant); *Crawford* v. *Jackson*, 323 F.3d 123, 128 (D.C. Cir. 2003) (hearsay may be considered in parole-revocation proceeding); *Espinoza* v. *INS*, 45 F.3d 308, 310 (9th Cir. 1995) (hearsay may be considered in immigration proceedings); 28 U.S.C. 2246 ("evidence may be

taken * * * by affidavit" in statutory habeas proceedings); 18 U.S.C. 3142 (2006 & Supp. III 2009) (hearsay admissible in pretrial detention hearings); 18 U.S.C. 3661 (hearsay admissible in sentencing hearings).

In performing that gatekeeping function, the district court judges have had the benefit of detailed declarations from the government concerning intelligence-gathering methods and techniques used to create different types of reports. See, *e.g.*, C.A. App. 669-702. And in this case, the district court specifically declined to give the evidence any "presumption of reliability [or] credibility," App., *infra*, 6a, and it carefully addressed each piece of hearsay evidence in the record in reaching its conclusion.

Significantly, in many cases, much of the "hearsay" evidence supporting detention consists simply of military or other reports recording what the detainee has said. For example, in this case, key evidence included statements by petitioner himself that he traveled to Afghanistan in September 2001 for the purpose of training and fighting. App., *infra*, 7a-8a. Leaving aside the threshold point that records of a party's own statements do not constitute "hearsay," see Fed. R. Evid. 801(d)(2)(A), there are fewer legitimate bases for questioning the reliability of such routine records than for questioning some more attenuated intelligence reports, see *Parhat* v. *Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (stressing that hearsay evidence "must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability"). In such circumstances, a detainee can challenge the reliability of reports purporting to summarize what he has previously admitted simply by testifying at the habeas

hearing—a right open to all detainees in these proceedings.

The district court also did not err in admitting and relying on other intelligence reports in this case. Those reports explained that their source was the translated documents found at various locations tied to al-Qaida, such as the Tarnak Farms document, which was found at Tarnak Farms, an al-Qaida training facility. See, *e.g.*, C.A. App. 595. In addition, in concluding that the intelligence documents had sufficient indicia of reliability to help show that petitioner was part of the group of al-Qaida fighters barricaded in the hospital, the district court carefully reviewed the documents, comparing them with each other, with al Joudi's statements, with petitioner's own statements, and with contemporaneous news accounts. App., *infra*, 14a; see Pet. App. 7, 13-19. Thus, as this case illustrates, the approach to hearsay endorsed by the court of appeals and applied by the district courts is correct and is fully consistent with both *Hamdi* and *Boumediene*.

b. The district courts have fashioned habeas procedures for Guantanamo detainees that furnish safeguards concerning the use of hearsay evidence by allowing the detainees' counsel access to the evidence and an opportunity to contest the reliability of particular pieces of evidence. See *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168 (1988) (upholding the admission of evidence "subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish [its] weight"). The district courts have generally allowed intelligence reports and expert declarations to be introduced (by both parties), while the detainee and his counsel have had substantial opportunities to challenge the government's assertions and to question the evi-

dence. See Case Management Order, *Awad* v. *Obama*, No. 05-cv-2369, Docket entry No. 95 (D.D.C. Nov. 7, 2008); Order, No. 05-cv-2369, Docket entry No. 110 (D.D.C. Dec. 16, 2008) (amending Case Management Order). In this and other cases, for example, the government has filed a factual return and complied with its obligations to disclose "exculpatory evidence"—that is, evidence that would tend to show that the detention standard is not met—and petitioner has had the opportunity to make additional requests for specific discovery. See Case Management Order; App., *infra*, 2a. Petitioner's attorneys were granted security clearances and given access to the classified evidence, and petitioner responded to the government's factual return with a traverse. *Ibid.* Petitioner's counsel had an opportunity to raise questions regarding the government's intelligence documents, and petitioner had an opportunity (which he declined) to testify at a hearing in order to challenge the accuracy and reliability of any documents summarizing any of his prior statements, as well as to provide an explanation for his presence with the al-Qaida fighters in the hospital. See Pet. 8. Indeed, petitioner's claim that it was improper for the district court to rely on hearsay is substantially undermined by his reliance on an unsworn declaration, rather than his own testimony, to tell his story and support his challenge to the government's evidence. App., *infra*, 3a-4a; C.A. App. 300-304.

Petitioner's only specific challenges to the district court's reliance on hearsay concern al Joudi's statement (Pet. 32), and the Tarnak Farms list (Pet. 17-18). But the district court relied on those pieces of evidence only to the extent that they were corroborated by other evidence in the record: the names on the list matched up

against the names identified by al Joudi as belonging to members of the al-Qaida group barricaded in the hospital, as well as with the names on two other classified documents tied to al-Qaida. App., *infra*, 14a. That evidence also squared with petitioner's multiple statements that he went to Afghanistan in September 2001 to train and fight, *id.* at 7a-8a, his admission that he was "surrendered by the insurgents" (Pet. 7), as well as multiple contemporaneous news accounts putting petitioner with the al-Qaida group behind the barricade in the Mirwais hospital, App., *infra*, 10a n.4.

As the court of appeals explained, the "district court took the Tarnak Farms Document, considered the circumstances of the document, and weighed it accordingly in its analyses of the various questions," and it "was not error for the district court to find the document relevant on some issues, but not others." Pet. App. 13. Similarly, the "listing of identical names in the [redacted] and in al Joudi's list indicates that al Joudi's statements identifying the other al Qaeda fighters were reliable." *Id.* at 15. The lower courts did not err in weighing all of the evidence together to determine that petitioner was part of the group of armed al-Qaida members who barricaded themselves in the Mirwais hospital. See *Bourjaily*, 483 U.S. at 179-180 ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it," because the "sum of an evidentiary presentation may well be greater than its constituent parts").

2. Petitioner also argues (Pet. 18-19) that application of a preponderance standard is inappropriate and that a higher standard should apply in this context. That is incorrect.

a. Habeas proceedings involving military detainees are unique and require a flexible approach tailored to

their specific circumstances. While the Court in *Boumediene* held in general terms that courts considering Guantanamo habeas petitions "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," 553 U.S. at 783, it did not specifically address what substantive or procedural standards would be appropriate. See *id.* at 796-797. Instead, the Court directed the district courts to craft appropriate standards, stating that "[t]he extent of the showing required of the Government in these cases is a matter to be determined." *Id.* at 787.

Implementing that directive from this Court, the district courts have reached a consensus that the government should bear the burden of showing, by a preponderance of the evidence, that detention is lawful. See Case Management Order.[2] And while the court of appeals has suggested that a lower standard of proof might be constitutional, see *Al-Adahi*, 613 F.3d at 1104-1105; *Al-Bihani*, 590 F.3d at 878 & n.4, it has held that the preponderance of the evidence standard adopted and applied by all of the district courts satisfies the Constitution. See, *e.g.*, Pet. App. 19-21; *Al Odah*, 611 F.3d at 13. None of petitioner's arguments demonstrate that the lower courts erred in applying that standard in evaluating his habeas petition.

b. As this Court has explained, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experi-

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[2] When the district court issued its Case Management Order in November 2008 adopting a preponderance standard, the government successfully challenged certain provisions of that order, but did not challenge its adoption of a preponderance standard and determined instead to meet that standard.

ence in the different situations." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 209 (1973) (internal quotation marks omitted). In *Boumediene*, this Court noted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." 553 U.S. at 783. For that reason, in the unique circumstances of the proceedings here, it is appropriate for the government to bear the burden of proof by a preponderance of the evidence, and not to apply the general habeas rule that a petitioner bears the burden to demonstrate his entitlement to the writ. See *Garlotte* v. *Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."). The early cases confirm that in cases of Executive detention "the ultimate burden of satisfying the judge" generally rested "with the respondent." R.J. Sharpe, *The Law of Habeas Corpus* 87-88 (1976). The preponderance standard adopted by the district court and upheld by the court of appeals is consistent with that approach because it requires the government to bear the ultimate burden of proof.

In accord with *Boumediene* and that historical background, where (as here) the Executive has not come forward with a prior administrative or judicial adjudication of the matter that might support a more deferential review, the presumptive baseline for civil proceedings—that the party with the burden of persuasion must establish its case by a preponderance of the evidence—should apply. While a higher standard of proof attaches at a criminal trial, it would be inappropriate to apply that standard to this non-punitive, law-of-war detention. This unique setting provides an exception to the general presumption against executive detention, see *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (exception for

detention arising as part of "the exigencies of war"), and "the law of war and the realities of combat may render [military] detentions both necessary and appropriate," *Hamdi*, 542 U.S. at 531 (plurality opinion).

Notably, the Army Regulation that establishes procedures for determining the proper status of certain military detainees in accordance with the laws of war and the Geneva Convention employs a preponderance of the evidence standard. See, *e.g.*, Army Regulation 190-8, ch. 1, § 1-6(e)(9) (1997) (inquiry into prisoner of war status). There is no basis for applying a higher standard here when adjudicating the lawfulness of the Executive's authority to detain an individual under the AUMF, as informed by the laws of war.

Moreover, as the district courts have unanimously held, the preponderance standard appropriately reflects the competing interests at stake in these habeas proceedings as they currently are conducted in the district court. Like any military detainee subject to detention under the laws of war, the individuals captured during the ongoing armed conflict and held at Guantanamo have an obvious interest in their own liberty. On the other side of the balance, there are "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). The preponderance standard provides the traditional procedural framework that appropriately balances those interests.

c. Although petitioner insists (Pet. 19) that a more stringent clear-and-convincing-evidence standard should apply, the lower courts' application of a preponderance standard allows for the "meaningful review" this Court envisioned in *Boumediene*, 553 U.S. at 783. Application

of a higher standard has no historical support, would be inconsistent with military practices for adjudicating prisoner-of-war status, and would ignore the practical difficulties in obtaining and producing relevant evidence in these military detention cases. See, *e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007) (concluding that "detention on [the basis of a preponderance standard] seems to us to be acceptable in view of the difficulties of collecting and preserving evidence in battlefield conditions"). A higher standard is not necessary for "meaningful review" and would create an inappropriate risk of harm to the government and the public at large, given that wrongfully released fighters could rejoin the battle against United States troops and interests. See *Salerno*, 481 U.S. 748-749 (emphasizing that "society's interest" in detention is "at its peak" "in times of war or insurrection").[3]

d. Finally, petitioner contends (Pet. 16) that courts should apply a sliding-scale procedural regime "depending on the circumstances of the case" and the "facts relating to capture." He suggests (Pet. 27) a higher stan-

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[3] Although it is appropriate for the government to bear the burden of proof by a preponderance of the evidence in these unique circumstances in which the government is not presenting and defending an administrative adjudication, the same approach may not apply in other contexts of review of military detention. See generally *Boumediene*, 553 U.S. at 786 (noting that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here"). For example, a formal military adjudication regarding the detainee's status could warrant substantial judicial deference. A less formal military decision might likewise warrant some degree of judicial deference. See, *e.g.*, *Hamdi*, 542 U.S. at 534 (plurality opinion); see also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949).

dard in cases where a person is not "engaged in armed conflict" when captured. Petitioner forfeited that argument by failing to advance it below, and, in any event, it lacks merit.

Petitioner's proposed sliding-scale burden of proof, which has not been accepted by any district court, would require collateral litigation aimed at making a "threshold demonstration by credible evidence that the individual was captured while engaged in armed conflict." Pet. 27. In other words, it would entail duplicative preliminary litigation on the dispositive issue in many of the Guantanamo habeas cases. In this case, for example, petitioner admits that he was with a group of armed al-Qaida fighters who were besieged in the Mirwais hospital and fighting United States forces. Pet. 7. A capture in that context would seem to qualify as a capture during "armed conflict" under any reasonable view of that standard. And the evidence that petitioner went to Afghanistan to fight and then was found with that group of fighters in the hospital, in conjunction with the corroborated statement by al Joudi that petitioner was part of the group, is "credible evidence" that petitioner was himself "engaged in [that] armed conflict." Pet. 27. Indeed, that is ultimately the finding that sustained petitioner's detention in the district court and on appeal. App., *infra*, 16a (finding that it was "more likely than not that [petitioner] knew the al Qaida fighters at the hospital and joined them in the barricade"); Pet. App. 23 (petitioner "succeeded in that goal [of joining the fight] by joining a group of al Qaeda fighters who took over part of a hospital and barricaded themselves therein"). Accordingly, even under petitioner's rule, there would be no basis for the courts below to apply a higher standard than preponderance of the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER*
Deputy Solicitor General
TONY WEST
Assistant Attorney General
ROBERT M. LOEB
AUGUST E. FLENTJE
Attorneys

MARCH 2011

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* The Acting Solicitor General is recused in this case.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-CV-2379

ADHAM MOHAMMED ALI AWAD, PETITIONER

v.

BARACK H. OBAMA, ET AL., RESPONDENTS

[Filed: Aug. 12, 2009]

MEMORANUM ORDER DENYING WRIT OF HABEAS CORPUS

Adham Mohammed Al Awad, a citizen of Yemen, alleges that he is illegally detained at Guantanamo Bay Naval Base and petitions this Court for a writ of *habeas corpus* to secure his release. The parties have cross-moved for judgment on the record. The government's motion will be granted.

I. Background

Awad has been in U.S. custody since his capture in Afghanistan on December 29, 2001. He filed his petition four years ago, but that petition and hundreds like it were put on hold until various legal issues, including the jurisdiction of this Court, were resolved. After the Su-

preme Court held that detainees like Awad have a right to bring *habeas* petitions and that federal district courts have jurisdiction to hear them, *Boumediene v. Bush*, 553 U.S. —, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), and after Judge Hogan issued his omnibus Case Management Order that has guided the Guantanamo habeas cases' procedures, this case moved on to the merits.

The government filed a factual return asserting the grounds on which Awad is detained—the claim is that he is an al Qaida fighter—and the evidence supporting that claim. Awad then made several requests for discovery. I denied some of those requests outright and denied others without prejudice to their later renewal with the kind of specificity required of motions under Fed. R. Civ. P. 56(f). Awad submitted his traverse without renewing his discovery requests. Both sides then moved for judgment on the record and a hearing on those cross-motions was held on July 31, 2008.

The government's core narrative is that Awad volunteered or was recruited for Jihad soon after September 11, 2001 and traveled from his home in Yemen to Afghanistan; that he trained at the Al Qaida "Tarnak Farms" camp outside Kandahar; that Awad and a group of other Al Qaida fighters were injured in a U.S. air strike at or near the airport in Kandahar and went to Mirwais Hospital for treatment; that these men then barricaded themselves in a section of the hospital; that U.S. and associated forces laid siege to the hospital; that Awad's comrades gave him up because they could not care for his severely injured leg, which had required amputation; and that, after Awad's capture, his al Qaida comrades fought to the death.

The government offers five groups of evidence in support of their narrative: (1) Intelligence reports of Awad's statements to interrogators; (2) statements of a former Guantanamo detainee named Al Joudi who was inside Mirwais Hospital during the siege and who gave a list of names and descriptions of the Al Qaida fighters, including a man with an amputated right leg who went by the name Abu Waqas—a *kunya* allegedly associated with Awad;[1] (3) [**REDACTED**] (4) a list found at Tarnak Farms bearing the name "Abu Waqas" and several of the names that also appear [**REDACTED**] on al Joudi's list of names; and (5) newspaper articles published in American newspapers about the siege at Mirwais Hospital.

Petitioner's story is that he traveled to Afghanistan in mid-September 2001 in order to visit another Muslim country for a few months, intending to return home after his visit; that in early November 2001 he was injured and knocked unconscious during an air raid while walking through a market in Kandahar; that he woke up in Mirwas Hospital after part of his leg had been amputated; that he was heavily medicated, floated in and out of consciousness, slept constantly, and could barely sit up; and that he remained in this condition until his capture.

Awad's case relies mostly on weaknesses and holes in the government's evidence, but, in support of his narra-

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[1] A *kunya* is a sort of traditional, honorific nickname [**REDACTED**] Decl. at 2. A man's *kunya* will often be the word "abu"—literally translated to mean father and then the name of his first born child. *Id.* According to [**REDACTED**], Al Qaida members also use *kunyas* as honorific pseudonyms. *Id.* These *kunyas* are not dependent on whether an individual is a father and are sometimes used to conceal a true identity.

tive, he submits an unsigned affidavit, a declaration from his counsel, and different intelligence reports of different statements made to interrogators.

II. Legal Standards

> The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization of Military Force, Pub. L. 107-04, 115 Stat. 224 (2001).

A. Substantial Support

The government's position is that:

> [t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who *were part of*, or substantially supported, Taliban or *al-Qaida forces* or associated forces that are *engaged in hostilities against the United States or its coalition partners*, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondent's Revised Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at p. 3 (emphasis added) .

In a thoughtful decision that has been followed by many if not most of the judges of this court, *Hamily v. Obama*, 2009 WL 1393113 (D.D.C. 2009), Judge Bates wrote that the "key inquiry" when analyzing the "part of . . . al Qaeda" test is "whether the individual functions or participates within or under the command structure of the organization—*i.e.* whether he receives and executes orders or directions." *Hamily*, 2009 WL 1393113 at * 8 (internal citations omitted). I have adopted Judge Bates' approach.

B. Hearsay, Authenticity, Chain of Custody

The government's case relies on "raw" intelligence data, multiple levels of hearsay, and documents whose authenticity cannot be proven (and whose provenance is not known and perhaps not knowable). Awad argues that such evidence should excluded because the government has not made individualized showings that "the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security." CMO II (A). The government responds generally (not with individualized showings) that its intelligence documents are reliable because they were created during the intelligence gathering process and explains generally why the presentation of non-hearsay evidence would be a burden. The government urges that documents and reports generated for intelligence purposes should be accorded a presumption of reliability and credibility.

The suggestion of a presumption of reliability and credibility goes too far because it would seem to place the burden of rebuttal on the petitioner. I have instead formally "received" all the evidence offered by either side but have assessed it item-by-item for consistency, the conditions in which statements were made and documents found, the personal knowledge of a declarant, and the levels of hearsay. In other words, I have given the evidence the weight I think it deserves.

C. Burden of Proof

The government had the burden of proving the lawfulness of detention by a preponderance of the evidence. CMO II (A); *accord, Al Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009); *Ali Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009). The burden of proof never shifted to Awad. No inference was drawn from Awad's decision not to testify or from his failure to sign or swear to his affidavit.

D. Detention for the Continuation of Hostilities

I acknowledge the power of Judge Huvelle's argument in **[REDACTED]** v. *Obama*, **[REDACTED]** that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining battle," but I decline to follow it in this case and have not considered whether or to what extent the continued detention of Awad supports the AUMF's self-stated purpose of "prevent [ing] . . . future acts of international terrorism," Pub. L. 107-04, 115 Stat. 224. Awad is a marginally literate amputee who has spent more than seven of his twenty six years—since he was a teenager—in American custody. It seems

ludicrous to believe that he poses a security threat now, but that is not for me to decide. Combat operations in Afghanistan continue to this day and—in my view—the President's "authority to detain for the duration of the relevant conflict" which is "based on longstanding law-of-war principles" has yet to "unravel." *See, Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) .

III. The Evidence

A. "Then Why He Here"

The record does not establish the date of Awad's entry into Afghanistan, but the parties agree that it was sometime in September 2001. *See*, ISN 88 Knowledgeability Brief (February 6, 2002). The government's suggested inference, that Awad wished to join Al Qaida to fight against the U.S. after the September 11 attack on the World Trade Center, finds support, although unclear support, in what Awad told several investigators: that he had met a man named Suraga at a mosque in al-Burayqa, Yemen, and that Suraga suggested to Awad that he go to Afghanistan to receive "training,"[2] ISN 088

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[2] In his affidavit, Awad claims that any incriminating statements he made were made "as a result of torture, the threat of torture or coercion and are therefore unreliable." Awad Aff. ¶ 5; Jones Aff. ¶ 7. The only specific allegation of coercion is the claim that interrogators threatened to withhold medical treatment until Awad provided them information. The government retorts that interrogators' notes reveal that Awad was provided care and that he used his medical condition as an excuse to avoid answering difficult questions. Even if such threats were made, *see*, ISN 88 MFR (August 4, 2003) ("Detainee . . claimed that one interrogator told him that if he did not cooperate that he would not receive care for his leg . . This is highly unlikely. . . . "), petitioner has failed to adequately connect these threats to any of his inculpatory statements.

MFR (March 21, 2002); cf., ISN 88 SIR (July 8, 2008); ISN 88 Handnote (Dec. 29, 2001); and that Awad traveled to Afghanistan to train with weapons or to become a fighter, ISN 088 SIR (July 23, 2005) (Went to Afghanistan to visit an Islamic nation and to receive weapons training); ISN 088 Knowledgeability Brief (Feb. 6, 2002) ("[W]ent to Afghanistan to become a fighter but never became one."); ISN 88 SIR (July 8, 2008).

Awad argues that the evidence shows that he entered Afghanistan around mid-September, and that it is unlikely he could have met Suraga, arranged his trip, and traveled to Afghanistan in only a few days or weeks after September 11th. *Id.* ("Source arrived in Afghanistan in mid-September ."). But the most natural answer to the theoretical question an interrogator scribbled on his notes of the first interview of Awad—"then why he here"—is the one suggested by the government's argument.

B. Training

The name "Abu Waqas" appears twice (once crossed out) on a list of names found in a one hundred page document retrieved from Al-Qaida's "Tarnak Farms" training camp in Kandahar sometime after that facility was taken by U.S. and associated forces.[3] IIR 7 739 3338 02. An intelligence report states that the document also contains notes on small arms and sniper training instruction, and aiming and distance calculations. AFGP-2002-00319.

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[3] There is no dispute that Tarnak Farms was an Al Qaida camp that provided advanced training. *See, generally,* [REDACTED] Decl.

Awad denies any association with the name "Abu Waqas," but this denial is not credible. He has identified himself on at least one occasion as "Waqqas Adham Mohammed Ali Ala-Awad." ISN 88 FD-302 (May 4, 2002). The name Waqas was attributed to Awad by the author of a "handnote" from an interview taken just after Awad's capture. ISN 088 Handnote (December 29, 2001). At the merits hearing petitioner's counsel finetuned the argument to an assertion that Awad never used the honorific "Abu" before "Waqas." That position is inconsistent with the other evidence. "Abu" appears before 53 of the 59 names on the Tarnak Farms list. IIR 7 739 3338 02; **[REDACTED]** Decl. at 2.

Except for the appearance of what seems to be his name on a list, however, the evidence that Awad received training at Tarnak Farms is nonexistent. We do not know the purpose of the list or when it was written. Even the translator claimed only that it was possibly" a list of trainees. IIR 7 739 3338 02. Awad himself has consistently denied that he ever attended an Al Qaida or Taliban training camp. Awad Aff. ¶¶3-6; ISN 88 Handnote (Dec. 29, 2001) ("EXPERIENCE learned how to use a Kalashnikov in Yemen"); ISN 88 SIR (July 8, 2008) (" . . . never received any training.").

This is Awad's account of his whereabouts at the time the government believes he was at Tarnak Farms:

> Accompanied by a friend named Suraga . . . [he] took a bus to Quetta Pakisatan and stayed in a Taliban controlled student hostel for five days. They then took a taxi . . . to Kandahar Afghanistan. They stayed two or three days in another Taliban student hostel until they found a house to rent. They stayed in the house for a month and a half to two

> months. The purpose of detainee's trip was to relax, gain weapons training, and join the fight in Afghanistan, but they never received any training.

ISN 88 SIR (July 8, 2008). That account may be implausible, but, in the absence of better evidence on the government's side, I find the claim of Tarnak Farms training to be unsupported.

c. Mirwais Hospital

The government relies mostly on newspaper articles to provide background information on the barricade and siege at Mirwais Hospital.[4] Awad has not asked that I disregard those articles, conceding that "they are informative on certain points." Tr 55:1-8. I will accordingly consider the articles sufficiently reliable on points that are not seriously disputed: that Al Qaida fighters entered and barricaded themselves inside the Mirwais Hospital at some time during the first week of December 2001; that U.S. and affiliated forces laid siege to the hospital; and that the siege ended in late January 2002 when U.S. associated forces confronted and killed the remaining members of the Al Qaida group. I will also turn to these articles to fill in evidentiary gaps when there is corroboration.

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[4] Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12; Drew Brown, *Al-Qauda Group Holed up in Hospital*, Phil. Inq , Dec. 30, 2001, at A10; Pamela Constable, *Kandahar Hospital Seige Ends in al Qaeda Deaths*, Wash. Post, Jan 28, 2002, at A12; Thomas E. Ricks & Karl Vicks, *U S Reports Calm in Afghanistan on Christmas Eve, At Kandahar Hospital, Arrest Brings Gunfire*, Wash Post, Dec. 25, 2001, at A21, *Drew Brown, Armed Patients, Not the Sick, Biggest Concern at Hospital*, Miami Herald, Dec. 26, 2001, at 21A.

Awad concedes that he was captured In the Mirwais Hospital on December 29, 2001. Tr 53:21-25. The government's primary evidence of Awad's involvement that he participated in the siege is statements by Majeed Abdulla al Joudi, a former Guantanamo detainee who claimed to have been inside the hospital and to have spoken with the al Qaida fighters. ISN [**REDACTED**] FD-302 (June 6, 2002); IIR 2 340 6056. [**REDACTED**], who was captured on December 25, 2001 (and who denies that he was part of al Qaida), told interrogators that he was in Afghanistan working with the charity Al Wafa; that one day he was hit by a car; that he woke up in Mirwais Hospital in the same room as the Al Qaida fighters; and that they struck up a conversation. ISN [**REDACTED**] FD-302 (June 6, 2002). They told him that they were involved in a car wreck[5] while fleeing a U.S. airstrike and talked about their weapons, although al Joudi never saw any. IIR 2 340 6056 02. Al Joudi also provided names and descriptions for the surviving eight members of the al Qaida group, including an "Abu Waqqas" from Yemen who had had his right leg amputated. *Id.* Four of the other names that al Joudi provided were identical to or transliterations of names listed near "Abu Waqas" on the Tarnak Farms document. *Compare,* IIR 2 340 6056 02, *with,* IIR 7 739 3338 02.

Awad was shown a picture of [**REDACTED**] but denied ever knowing him. ISN 88 FD-302 (October 15, 2002). He says that he did not arrive at the hospital with those al Qaida fighters and that he was injured in a market in Kandahar during a bombing raid. ISN 88 SIR (July 8, 208)(sic); Awad Aff. ¶8; ISN 88 SIR (July 8, 2008) ("When the [U.S.] airstrikes began in the city of

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[5] Apparently there are man bad drivers in Afghanistan.

Kandahar [Awad was separated from Sugara] and he never saw him again. [Awad] was pulling someone from the rubble of a bomb destroyed building when he was injured. . . . He woke up in a hospital. . . . "). Awad asserts that after his leg was amputated he was "located near elderly patients and children" and that while at the hospital he was "semi-conscious and in continuous pain—[and was] on pain medication throughout [his] time in the hospital that made [him] sleep." Awad Aff. ¶14. He "denied being with the other Arabs . . . and offered that he was on the first floor of the hospital . . . [but] was later moved to the second floor . . . where there were other Arabs whom he did not know." ISN 88 FD-302 (October 15, 2002); Awad Aff. ¶¶ 12-13. Awad states that he was "unarmed when he was taken by Afghan security forces from the hospital," Awad Aff. ¶16; ISN 88 **[REDACTED]**[6] ("No weapons or documents were found on" Awad when he was arrested), an assertion that is uncontested.

The only first-hand evidence offered by the government about Awad's capture was the report of a March 2006 interview with a Commander Momuck who claimed that he led the group that had taken Awad into custody. Momuck FM40 (March 15, 2006). That report is internally inconsistent, completely unreliable, and is given no weight.

The government's time line for Mirwais is flawed, too. Three intelligence reports state that Awad was either injured or "captured" on or before November 2, 2001. ISN 88 Baseball Card ("Circumstances of Capture: DOC: 2 Nov 2001 near Kandahar. He was injured on 20

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[6] **[REDACTED]** Tr. 32: 21-23

Oct 01 and hospitalized locally until arrest by the AMF."); ISN Knowlegability Brief (February 6, 2002) ("Source . . . was captured [11/02/2001] when he was injured near the airport in Qandahar."); ISN 88 MFR (March 21, 2002).

The November 2 date, if true, would mean that Awad did not enter the hospital with the Al Qaida fighters who participated in the barricade. The government suggests that the November 2, 2001 date in ISN 088 Knowlegability Brief (February 6, 2002) was a typographical error and that Awad's injury more likely occurred on December 2, 2001, the approximate date that the Al Qaida fighters barricaded Mirwais Hospital. Although there is some evidence to support this theory, *see,* ISN 88 Handote [sic] (December 29, 2001) (stating that the date of "capture" was "3 weeks ago,"),[7] I will not credit this convenient explanation. It does not explain why the Baseball Card states that Awad was injured on October 20, 2001. Nor does it explain why a different typo in the Knowledgeability Brief was later corrected, while the November date was left unchanged. *Compare,* ISN 088 Knowledgeability Brief (February 6, 2002), *with,* ISN 088 MFR (March 21, 2002); *see,* Res. MJR at 26.[8]

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[7] The parties are in general agreement that "capture" in this document should be read as "injury." Tr. 52:2-54:9; Res Opp. 26-28.

[8] The Baseball Card has some obvious inaccuracies such as that Awad "is married and has two children." ISN 88 Baseball Card Although this undermines the credibility of any information from that document, the government was unable to find the underlying document from which the November 1, 2001, date was taken. Tr 33:19-23. Because the November date is favorable to Awad and it is not refuted with equally strong evidence, I will assume it to be accurate.

D. [REDACTED]

Up to this point, we have (a) a reasonable inference that Awad went to Kandahar to fight, (b) no reliable evidence that he was actually trained there, (c) undisputed evidence that he was in Mirwais Hospital during part of the siege, and (d) inconsistent evidence about how and when he arrived there. [REDACTED] Five of their names match names found on the list provided by Al Joudi, and three of them match names found on the Tarnak Farms document. [REDACTED] IIR 7 739 3338 02, *and* IIR 2 340 6056 02.

[REDACTED] That remark finds corroboration in a newspaper account of a fighter who was killed trying to escape the siege at Mirwais *after* the date that Awad was captured. Karl Vick, *Hospital Detention of Arab Fighter Ends With Suicide*, Wash. Post, Jan 8, 2002, at A12.

[REDACTED] [9]

[REDACTED] [10]

Awad denies that [REDACTED]. He denies having met al-Dhali or al-Fadhl. Awad Aff. ¶7. He argues that,

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[9] The government relies on an identification of al-Dhali by another detainee given during an interrogation taken at Bargram, Afghanistan. ISN 1453 FM40 (June 14, 2004).

[10] [REDACTED] the Guantanamo detainee told interrogators that he guarded the Kandahar Airport from after September 11, 2001, until mid-November 2001. ISN [REDACTED] FD-302 (November 1, 2002). Although Awad argues out that this would have prevented [REDACTED] from training at Tarnak Farms when Awad would have been there, that is not necessarily true. [REDACTED] said that he had trained at the Al Faruq camp, and it is logical that an Al Qaida guard would receive advanced training.

because the siege at Mirwais Hospital was a well-publicized event, al-Dhaii would have known that Awad was captured, and would not have guessed that he was hiding. Awad also points out [REDACTED].

The following table demonstrates the importance [REDACTED]. The correlation among the names on the al Joudi list, the Tarnak Farms list, [REDACTED] is too great to be mere coincidence. The [REDACTED] I believe, the points that tip the scale finally in the government's favor.

Al Joudi List	[REDACTED]	Tarnak Farms List	[REDACTED]
Abu Dujana	[REDACTED]	[REDACTED]	[REDACTED]
Abu Amar	[REDACTED]	[REDACTED]	[REDACTED]
Abu Thuwabb	[REDACTED]	[REDACTED]	[REDACTED]
Abu Wakaas with an amputated right leg	[REDACTED]	Abu Waqas	[REDACTED]
Abu Saheeb	[REDACTED]	[REDACTED]	[REDACTED]
Abu Bakr	[REDACTED]	[REDACTED]	[REDACTED]

Abu Habeeb	[RE-DACTED]	[RE-DACTED]	[RE-DACTED]
Abu Hamman	[RE-DACTED]	[RE-DACTED]	[RE-DACTED]

IV. Conclusion

The case against Awad is gossamer thin. The evidence is of a kind fit only for these unique proceedings [**REDACTED**] and has very little weight. In the end, however, it appears more likely than not that Awad was, for some period of time, "part of" al Qaida. At the very least Awad's confessed reasons for traveling to Afghanistan and the correlation of names on a the list [**REDACTED**] clearly tied to al Qaida make it more likely than not that he knew the al Qaida fighters at the hospital and joined them in the barricade.

* * *

The petition for writ of habeas corpus is denied.

/s/ JAMES ROBERTSON
JAMES ROBERSTON
United States District Judge

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No. 10-736

Supreme Court, U.S.
FILED
MAR 11 2011
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IN THE

Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD,

Petitioner,

v.

BARACK H. OBAMA, DAVID M. THOMAS, JR., TOM COPEMAN, and ROBERT M. GATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Diana M. Rutowski
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
650-614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
212-506-5000
jewald@orrick.com

Counsel for Petitioner

March 11, 2011

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INTRODUCTION

The Petition and Opposition together demonstrate that this Court should grant certiorari to review the United States Court of Appeals for the District of Columbia Circuit's decision here.

Awad's Petition squarely presents a crucial question of national significance. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court left open this issue: What are the appropriate procedural standards for the Guantanamo habeas cases? The Government does not dispute that the Petition presents that very question. And while Guantanamo-related cert. petitions raise many important issues, resolving *this* procedural standards question will directly impact *all* of the pending Guantanamo cases, as well as future executive detention cases.

Awad's case is the ideal vehicle for considering that important question, and the Government does not challenge that. The D.C. Circuit directly and explicitly ruled on the evidentiary standard and the standard of proof, and the evidence in this case is typical of the evidence used in the Guantanamo proceedings. Here, where the district court found that the Government's "gossamer thin" case barely met the preponderance standard (16a[1]), the procedural standards used made all the difference in the outcome.

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[1] Citations to "__a" are to the full unclassified version of the district court opinion attached to the Brief for the Respondents in Opposition ("Opp.")

There is no need for the issue to develop further in the D.C. Circuit, and the Government does not resist the Petition on that basis. The D.C Circuit has clearly stated its position on the appropriate procedural rules, and has reaffirmed adherence to that position in case after case.

The Petition shows that the D.C. Circuit erred in granting all Guantanamo detainees only the most minimal of procedural protections. The Government's defense of the D.C. Circuit's decision does not confront the Petition's central argument. Boiled down to its essence, the Government argues that the procedural rules adopted by the D.C. Circuit are appropriate because those are the only ones that the Government can satisfy. Such a results-oriented approach has no basis in this Court's precedent.

The Government argues against issuing the writ because it believes the D.C. Circuit reached the right result in Awad's particular case. That is no reason to decline review of a squarely-presented, difficult, and important question of executive power and national security. No matter what this Court would conclude on the merits, certiorari should be granted to provide much-needed guidance to the lower courts and the political branches.

The impact of the D.C. Circuit's procedural regime cannot be overstated. The Government misleadingly portrays Guantanamo detainees as far "ahead" based on a district court "win-loss" record of 38-21 Opp. 6. Seventeen of those habeas grants, however, involve petitions by Uighurs whose detention the Government did not defend. *See* Brief for the Respondents in Opposition at 3-4, *Kiyemba v.*

Obama, No. 10-775 (U.S. Feb. 9, 2011). More importantly, since the D.C. Circuit first announced its Guantanamo procedural rules in *Al-Bihani v. Obama*,[2] the scales have tipped dramatically in the Government's favor, with the Government twice as likely to prevail in the district court. The disparity reaches its apex in the D.C. Circuit, which to this day, still has not granted a single Guantanamo habeas petition.

Awad, like many other detainees, has been imprisoned at Guantanamo for more than nine years with no end in sight. It is time for this Court to answer the question expressly left open in *Boumediene*.

I. THE GOVERNMENT AVOIDS CONFRONTING THE QUESTION PRESENTED BY MISSTATING AWAD'S ARGUMENTS

The Government's Opposition exaggerates Awad's arguments and ignores the actual question presented by the Petition until the final pages of its brief. Setting aside the case-specific facts, the Government's Opposition is virtually a carbon copy of the brief it submitted in opposition to the petition filed in *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *petition for cert. filed*, 10-439 (U.S. Sept. 28, 2010). According to the Government, the

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[2] 590 F.3d 866 (D.C. Cir. 2010), *en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *petition for cert. filed*, 10-7814 (U.S. Nov. 29, 2010).

question presented by this Petition is "essentially identical" to that presented in *Al Odah*. Opp. 6.

The Government is wrong. While the two petitions raise related issues with some overlap between them, they are not "essentially identical." The *Al Odah* petition argues for the application of the Federal Rules of Evidence to the Guantanamo habeas cases and that a clear and convincing standard should apply to all such cases. This Petition, however, argues that the D.C. Circuit's blanket procedural rules for all Guantanamo cases are unconstitutional because they do not take into account the risk of erroneous deprivation of liberty in the detainee's particular case. The D.C. Circuit's minimal procedural protections are insufficient in cases, such as this one, where the detainee is not captured on a battlefield engaged in armed conflict. In such cases, where the detainee is at greater risk of misclassification, the courts should provide increased procedural protections. The Government completely dodges this fundamental point because it is not reasonably disputable.

Because of the overlap in issues, the Court may wish to consider granting both the *Al-Odah* and *Awad* petitions. Alternatively, if the Court grants certiorari in one of the cases, it should hold the other pending disposition of the granted case.

The Government buries its criticism of sliding-scale procedural rules on the penultimate page of the Opposition. The Government worries that this standard would "entail duplicative preliminary litigation." Opp. 18. That overstates the complexity of the proposed rule. Typically, it will not be difficult

to determine whether an individual was captured on the battlefield engaged in armed conflict. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality) (Hamdi "was carrying a weapon against American troops on a foreign battlefield").

The facts of this case make it most suitable for considering the procedural standards question. In particular, the Government is wrong to describe Awad as captured while engaged in armed conflict. The undisputed factual record on that issue shows the opposite to be the case. When captured, Awad was unarmed and the Government has never alleged that he undertook a single act of aggression against United States or affiliated forces. 12a. The district court found that Awad arrived at the civilian hospital before the al Qaeda fighters overtook it. 13a & n.8. When the al Qaeda fighters did arrive, Awad had just endured the amputation of a significant part of his leg. 12a. Yet, through an unreasonable inference, the district court found that "gossamer thin" evidence was enough to make it more likely than not that Awad chose that time—in his hospital bed—to join al Qaeda. *See* 16a.

Instead of responding to the issues presented by the Petition, the Government spends much of the Opposition responding to caricatures of arguments not made by Awad and to those advanced in the *Al Odah* petition. While recognizing that these habeas proceedings "are flexible and may be adapted to circumstances as necessary" (Opp. 8), the Government advocates a procedural straitjacket for every Guantanamo case, regardless of circumstance. Furthermore, by splitting Awad's question presented into two separate questions, the Government

violates a bedrock principle of habeas law. This Court could not have been clearer in *Boumediene*: In determining whether habeas procedures are sufficient, "[w]hat matters is the *sum total of procedural protections* afforded to the detainee . . . ." *Boumediene*, 553 U.S. at 783 (2008) (emphasis added). The question of whether the evidentiary rules adopted by the D.C. Circuit are appropriate cannot be reviewed in isolation, and the same is true for the standard of proof. The two are inextricably intertwined. Either procedural rule could seem sensible considered in isolation, but when they are paired together in a case with a high risk of erroneous deprivation, the D.C. Circuit's procedural rules do not offer detainees a "meaningful opportunity" to challenge their detention.

II. THE SUPPOSED "SAFEGUARDS" RELATING TO THE GOVERNMENT'S INDISCRMINATE USE OF HEARSAY OFFER LITTLE, IF ANY, PROTECTIONS TO THE DETAINEES

The very first sentence of the Government's Argument section is a patent overstatement—Awad nowhere argues that "district courts should not consider hearsay evidence" (Opp. 6) in Guantanamo cases. Awad accepts that hearsay may be used (*see, e.g.*, Pet. 28), but objects to the wholesale admission of all hearsay, to the total elimination of any right to confrontation, and to reliability determinations that are made in a circular fashion. To justify prolonged, indefinite detention—particularly where the standard is a mere preponderance of the evidence—the Government should have to offer at least a single piece of evidence that itself is reliable, i.e., a solid

foundation to indefinitely deprive an individual of his liberty.[3]

The Government defends the wholesale use of hearsay because detainees have a "safeguard[ ] concerning the use of hearsay evidence," namely their counsel's "opportunity to contest the reliability of particular pieces of evidence." Opp. 11. That is a safeguard in name only.[4] *See, e.g.*, Pet. 29-33. First, one cannot cross-examine a piece of paper that contains unsworn, inchoate, double- and triple-hearsay statements. Second, this case demonstrates the futility of contesting the reliability of a particular piece of evidence because the D.C. Circuit's rule allows the Government to establish reliability by using other presumptively unreliable documents. Awad successfully argued to the district court that the Tarnak Farms list was unreliable evidence because the court could not determine the

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[3] The "intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases" (Opp 8) are not the type of official public records that fall within hearsay exception 803(8) of the Federal Rules of Evidence The Government does not take issue with the statement in the Petition that most of the intelligence reports offered are unfinished and are merely the first step in an intelligence cycle that is supposed to end with reliability assessments made by intelligence analysts *See* Pet 31.

[4] Similarly, the assertion that detainees have "the opportunity to make additional requests for specific discovery" is another illusory "safeguard " Opp 12 Here, every single discovery request made by Awad was opposed by the Government and denied by the district court 2a. Successfully obtaining discovery from the Government in the Guantanamo habeas cases is the rare exception.

significance of the names appearing on the list. 9a-10a, 14a. Yet, incredibly, the district court later used that admittedly unreliable document as a linchpin of its decision. *See* 14a-15a. Regardless, a watered-down reliability restriction offers little protection to the detainees. *See Michigan v. Bryant*, No. 09-150, -- S. Ct. --, 2011 WL 676964, at *29 (Feb. 28, 2011) (Scalia, J., dissenting) ("Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in . . . trials implicating threats to national security.").

III. THE D.C. CIRCUIT'S ADOPTION OF THE PREPONDERANCE STANDARD FOR ALL GUANTANAMO CASES CONFLICTS WITH THIS COURT'S PRECEDENT

In rejecting the argument that the appropriate standard in this case is clear and convincing evidence, the D.C. Circuit failed to support its conclusion and the Government offers little more in its Opposition. The Government offers three justifications for the preponderance standard (Opp. 16-17), none compelling.

First, the Government asserts that the clear and convincing standard has no "historical support." Opp. 17. In a sense the Government is correct, but that is only because what the Government is seeking to do here—indefinite, prolonged detention solely on the basis of executive order—is unprecedented. *See Boumediene*, 553 U.S. at 770-71 ("[T]he cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from

September 11, 2001, to the present, is already among the longest wars in American history."). The Government cites no case in which this Court upheld prolonged detention with anything less than clear and convincing evidence as the standard of proof. The consistent precedent from this Court is all contrary to the Government's position. *See* Pet. 19.

Second, the Government contends that a clear and convincing standard would be inconsistent with the preponderance standard set forth in Army Regulation 190-8, which applies to military tribunals under Article 5 of the Geneva Conventions. Opp. 17. The comparison is inapt. Article 5 tribunals are not constituted to determine whether prisoners should be indefinitely detained; rather, they are expedited hearings to determine whether a prisoner is entitled to the protections of the Geneva Conventions.

Third, the Government argues that a clear and convincing standard is inappropriate because it would typically be unable to satisfy such a standard. Opp. 17. The Government exaggerates the burden such a standard would impose on it. Awad is only seeking application of the intermediate standard of proof, not the criminal beyond a reasonable doubt standard, in a subset of the Guantanamo cases. In the recent executive power cases, this Court recognized that the Government overstated the difficulties it would encounter if put to a certain procedural burden. *See, e.g.*, *Boumediene*, 553 U.S. at 769 ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); *Hamdi*, 542 U.S. at 534 ("We think it unlikely that th[e]

basic process [in the enemy-combatant proceedings] will have the dire impact on the central functions of warmaking that the Government forecasts."). The Court should proceed with the same healthy skepticism in this case.

While the law review article upon which the Government relies (Opp. 17) reaches the tepid conclusion that a preponderance of the evidence standard in the Guantanamo cases is "acceptable," it also notes that authorizing indefinite detention on the basis of that standard is "not untroubling" and "given the normative pull of the criminal law baseline, it remains unsettling to uphold detention when it is only barely more likely than not that the citizen is an enemy combatant." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007). This is a difficult and grave question of law that this Court should resolve without delay.

IV. THERE HAS BEEN NO WAIVER

The Government asserts in passing (Opp. 18) that Awad waived his argument that the appropriate procedural rules depend upon the circumstances of the case. There is no waiver. Awad argued in the D.C. Circuit that the procedures adopted by the district court in this case violated the Constitution, particularly the wholesale admission of hearsay paired with the minimal preponderance of the evidence burden. *See, e.g.*, Brief for Appellant at 52-53, *Awad v. Obama*, No. 09-5351 (D.C. Cir. Mar. 19, 2010). The D.C. Circuit rejected that argument, reaffirming its statement in *Al-Bihani* that the same

procedural standards apply to all Guantanamo cases, regardless of the circumstances of the case. App. 20-21. To the extent that Awad has expanded on the reasoning behind his argument in the Petition and modified the question slightly to account for that reasoning, he is free to do so. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Diana M. Rutowski
Orrick, Herrington & Sutcliffe LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
(212) 506-5000
jewald@orrick.com

Counsel for Petitioner